TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~212~~ 49.

THE STATE OF NEW JERSEY, APPELLANT,

vs.

WILLIAM F. ANDERSON, TRUSTEE OF COSMOPOLITAN POWER COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED JUNE 15, 1905.

(19,804.)

(19,804.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 302.

THE STATE OF NEW JERSEY, APPELLANT,

vs.

WILLIAM F. ANDERSON, TRUSTEE OF COSMOPOLITAN POWER COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 17, 1905.

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Transcript of Record.

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1904.

In the Matter of COSMOPOLITAN POWER COMPANY, Bankrupt.

STATE OF NEW JERSEY, Appellant,
vs.
WILLIAM F. ANDERSON, Trustee of the Estate of Cosmopolitan Power Co., Bankrupt, Appellee. } No. 1122.

Mr. Robert H. McCarter, Mr. Levy Mayer, counsel for appellant.
Mr. Frank W. Wheeler, Mr. F. D. Silber, Mr. Martin J. Isaacs, counsel for appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

Transcript of record filed Oct. 7, 1904.
Printed record filed Oct. 14 1904.

EDWARD M. HOLLOWAY, Clerk.

1 Pleas had at a regular term of the district court of the United States for the northern district of Illinois, begun and held at the United States court rooms in the city of Chicago, in said division of said district, on the first Monday of July (it being the fourth day thereof), in the year of our Lord one thousand nine hundred and four and of the Independence of the United States the one hundred and twenty-ninth year.

The Honorable Christian C. Kohlsaat, judge, being absent; John C. Ames, United States marshal being absent,
In pursuance with the order of the court of date July 2, 1904, T. C. MacMillan, clerk, by his deputy Chas. A. Buell, being now here present, adjourns said court until Wednesday, July 6, A. D. 1904 at ten o'clock a. m.

2 Be it remembered that heretofore, to wit, on the 4th day of January, A. D. 1904, there was filed in the office of Sidney C. Eastman, referee, *In re* Cosmopolitan Power Co., bankrupt, objections trustee to claim of State of New Jersey, and afterwards, to wit, on the 30th day of September, A. D. 1904, said objections were filed in the clerk's office of said court, same being in the words and figures following, to wit

Objections of Trustee to Claim of State of New Jersey. Filed Jan. 4, 1904.

In the District Court of the United States for the Northern District of Illinois.

In re COSMOPOLITAN POWER Co., Bankrupt. In Bankruptcy. No. 9059.

Objections of William F. Anderson, Trustee, to the Claim of the State of New Jersey for $9,254.90.

Comes now William F. Anderson, trustee of the estate of the Cosmopolitan Power Co., bankrupt, and makes objection to the above entitled claim, upon the following grounds:

1. That nothing is due the State of New Jersey from said bankrupt.
2. That franchise taxes of the kind claimed by said State of New Jersey are not a proper or provable claim in bankruptcy.
3. That a part of the items claimed is interest on deferred tax payments, which should not be allowed.
4. That no taxes for 1903, during which time said corporation had ceased to do business and to use its alleged franchise and privilege can be allowed as a provable claim.
5. That no interest on such 1903 taxes can be claimed or allowed.
6. That said taxes claimed is not a claim entitled to payment by priority or in full.
7. That said taxes were not levied or spread in accordance with the law, and are not, therefore, a proper or allowable claim.
8. That said claim is otherwise improper, informal and insufficient.

3 Wherefore, this trustee prays that said claim be disallowed and denied.

WILLIAM F. ANDERSON,
Trustee of said Estate.

WHEELER, SILBER & ISAACS,
Attorneys for Trustee.

Endorsed: G. No. 9059. U. S. district court of northern dist. of Ills. Cosmopolitan Power Co., bankrupt. Objections of trustee to claim of State of New Jersey $9254.90. Filed Jan. 4, 1904 at 10 a. m. Sidney C. Eastman, referee. Filed Sep. 30, 1904. T. C. MacMillan, clerk.

And afterwards, to wit, on the 12th day of March, A. D. 1904, there was filed in the clerk's office of said court in the above entitled cause, a certificate for review, same being in the words and figures following, to wit:

Certificate for Review. Filed March 12, 1904.

In the District Court of the United States for the Northern District of Illinois.

In the Matter of COSMOPOLITAN POWER COMPANY, Bankrupt. No. 9059.

To the Honorable C. C. Kohlsaat, judge of said court:

The petition for review having been filed asking for a review of an order made by myself in the above entitled cause, I hereby certify that the facts proven, the order based thereon and my reasons therefor are hereto attached as Exhibit "A."

I also attach a stipulation by the parties, marked Exhibit "B."

I also attach the petition for review of the above order filed by the counsel for the State of New Jersey, marked Exhibit "C."

SIDNEY C. EASTMAN, Referee.

4 EXHIBIT A—Opinion of Referee.

EXHIBIT "A."

In the District Court of the United States for the Northern District of Illinois.

In the Matter of COSMOPOLITAN POWER CO., Bankrupt. No. —.

The State of New Jersey has filed a claim in the above entitled case for the sum of $9254.90, which has been duly verified by the comptroller of the treasury of the State under oath, and setting up it was entitled to be allowed as a prior claim against this estate the aforesaid amount from franchise tax levied by the State for the year 1902-1903, under the provisions of the act of the legislature entitled "An act to provide for the imposition of State taxes on certain corporations and for the collection thereof," April 18, 1884, and the acts supplemental thereto. The amount is made up of the items in the following statement attached to the proof of claim:

"Tax—1902	$5750.
Interest to October 15, 1903	891.25
Costs on injunction proceedings	26.15
Because of non-payment of taxes.	
Tax—1903	2500.00
Interest to October 15, 1903	87.50
	$9254.90"

The trustee filed the following objections:

1. That nothing is due the State of New Jersey from said bankrupt.

2. That franchise taxes of the kind claimed by said State of New Jersey are not a proper or provable claim in bankruptcy.

3. That a part of the items claimed is interest on deferred tax payments, which should not be allowed.

4. That no taxes for 1903, during which time said corporation had ceased to do business and to use its alleged franchise and privilege, can be allowed as a provable claim.

5. That no interest on such 1903 taxes can be claimed or allowed.

6. That said taxes claimed is not a claim entitled to payment by priority or in full.

7. That said taxes were not levied or spread in accordance with the law, and are not, therefore, a proper or allowable claim.

8. That said claim is otherwise improper, informal, and insufficient.

The question arises whether said tax is such a tax as is entitled to priority under the provisions of the bankruptcy act. Section 64*a*, entitled, "Debts which have priority," says: "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality, in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

There appear to be only three decisions under the present act which have been published in the bankruptcy reports touching this question.

In the case of *Re* Ott, 2 A. B. R. 637, 95 Fed. 274, decided by Judge Woolson for the southern district of Iowa, the court held in substance, that the Iowa statute providing for a "mulct tax" or a license fee for carrying on a saloon business was not a claim entitled to such priority, because the supreme court of Iowa had decided that it was not a tax (Smith *vs.* Skow, 97 Iowa 640), and that the State decision construing such question should be followed by the United States court in bankruptcy in the district where such decision had been made. The court in this decision uses the following language: "It matters not that the legislature in the statute speaks of this lien as a tax. That does not make it a tax. It is in reality a charge or license exacted for the privilege of carrying on the business of vending liquors, which charge is made by statute a lien upon all property both personal and real used or connected with the business."

Referee Allen in the southern district of New York held in a case presented similar to the one under discussion (which was affirmed, as I am advised by counsel for the defendants), arising on a claim

filed by the State of New Jersey before him for such a tax,
6 that the same was a tax, basing his opinion on the decision of the supreme court of New Jersey. (Hancock, comptroller, *vs.* Singer Mfg. Co., reported in 62 N. J. Law 289.)

Judge McPherson in the district court for the eastern division of Pennsylvania, *In re* Danville Rolling Mill Co. 10 A. B. R. 327, held in a claim presented by the same State for the same purpose, that the supreme court of New Jersey, in the case of U. S. Car Co., 60 N. J. Equity, 514, had used language holding that the claim was not a tax, and therefore did not come within the provisions of section 64*a*.

It is desirable before proceeding to a discussion of the principles involved to ascertain what the New Jersey court of appeals has held on the subject.

The two cases influencing the two district courts in New York and Pennsylvania were decided within six months of each other. The Hancock case, decided on November 14, 1898, was an application by the comptroller of the State to assess the license tax so called on the corporate stock of the Singer Mfg. Co. It was resisted on the ground that the special charter of the company contained an exemption from any tax or impost whatsoever on its property outside of New Jersey, and also on the capital stock in the hands of the stockholders.

The comptroller made the point that the franchise tax was neither a tax nor an impost and consequently did not come under the privilege of the exemption, and also that the tax on the corporate stock would not be a tax on the individual stockholder.

The court held that it would be a breach of faith with the corporation to strain a technicality as claimed and that the words "any impost whatever" would cover the exemption and that the levying the franchise tax in the corporation would in effect be taxing the individual stock.

The second case decided some six months later by the same court arose from an attempt by the comptroller to enforce the franchise tax as a prior claim on an insolvent corporation in New Jersey. The court held that because of a section (sec. 6, Law of 1896 of N. J.) which made specific provision binding insolvent corporations for this franchise tax it would hold the incorporation liable, although in discussing the case the court said: "Although the statute con-
templated an imposition of this kind as a license fee or fran-
7 chise tax, it plainly is not a tax upon corporation franchises. In fact, it is not, strictly speaking a tax at all nor has it the elements of one. It is in reality an arbitrary imposition laid upon the corporation without regard to the value of the property or of its franchises and without regard to whether it exercises the latter or not, solely as a condition of its continued existence. The State in creating a corporation has the right to impose upon its creature such conditions as the legislature within constitutional limit may deem proper, and the acceptance by the corporation of the franchises, powers and privileges conferred upon it binds it to the performance

of those conditions so long as it continues to remain in possession of those franchises, powers and privileges, and the conditions themselves remain unrevoked by the legislature. And this is so without regard to the solvency or insolvency of the corporation, the value or want of value of its franchises, or whether or not it is exercising them, either by its officers and directors or through a receiver. The sole test, in determining its liability to comply with those conditions, so long as they remain unrevoked, is the existence or non-existence of the corporation."

This language in holding that it is not strictly speaking a tax, although collected in New Jersey, would seem to indicate that the court took the same position as the Iowa court, in holding that a license to do business was not a tax, irrespective of the question whether a license fee or not is enforceable against corporations who may be doing business in that State.

If, therefore, the language of the highest court of New Jersey be taken as conclusive on the subject, that in that State this claim is not a tax, and if the decisions of Judge McPherson and Judge Shiras be taken as *as* sound in holding that the law of the State where the tax was imposed as to its definition be conclusive as against the claim, then it should be here held that the claim should not be allowed as a prior claim but as an ordinary claim sharing equally with other creditors in the distribution of the estate.

However that may be, it would seem on general grounds that the claim was not well founded. It is a command on the part of the State to those desiring incorporation, that the corporation shall pay certain charges to the State as a condition for being allowed
8 to do business. In Illinois such a charge is made a condition precedent and is a lump sum apportioned to the amount of the capital stock. In New Jersey, not only a preliminary payment is required, but also future payments in the nature of conditions subsequent attach to the issuing of the franchise. In character it makes no difference whether the amount is payable at one time in the beginning or paid subsequently in instalments. It is a contract made between the State and the individuals for the breach of which the State has the privilege of cancelling the charter as well as collecting any amount that may be due. In New Jersey if the corporation was actually engaged in business in that State, by the same law, it becomes a prior claim in the event of the insolvency of the corporation. That provision, however, would not apply in Illinois as a ground for granting a prior claim against the estate. The bankruptcy statute says that it is the taxes that are due to the United States, State, county, district or municipality that are prior claims, and if it be not a tax but a contractual obligation merely then it would not be a prior claim in this State. In other words, the New Jersey statute providing that the insolvency of a corp[illegible]n does not prevent the State from collecting its assessment in fu[illegible]s not now apply.

The corporation in question is one that has been popularly termed

a "tramp" organization incorporated in one State with the expectation of doing business in another State, organizing in the first State because of certain privileges which its promotors conclude it cannot obtain in the State where it actually intends to do business. By the principles of comity prevailing between States such corporations are permitted to do business in foreign States subject to certain conditions, as in Illinois that of paying a fee to the State proportioned to the amount of capital stock actually embarked in business. In this case the corporation was capitalized for ten million dollars. Its entire capital stock was turned over in exchange for certain patent rights which were then and are now of uncertain and undetermined value. It consequently had no cash capital, and naturally, after a certain brief period of existence, became bankrupt and incurred a number of obligations which it was unable to meet. It would seem that the principles of the bankruptcy statute favoring equality among creditors would be violated in this instance by allowing the State of New Jersey to take so large a part of its assets (the 9 total amount of assets now ascertained amounting to $25,000.00), and unless it is clearly intended by the bankruptcy statute that such imposition should be considered as a tax and be awarded priority it would not be justifiable so to allow it.

It has been urged on behalf of the trustee that the word "State" in the bankruptcy act was intended to apply to the State where the bankruptcy proceeding is pending and where its assets are situate. There is considerable ground for this contention. One of the fundamental principles of taxation is that the property to be taxed should be within the jurisdiction of the State imposing the tax. It is a bare exercise of this franchise exercised solely in the State of Illinois which constitutes the ground of the New Jersey claim, all property of the bankrupt being situate in the State of Illinois; to hold that the State of New Jersey could collect this amount as a priority would be extending to the State of New Jersey privileges which I find no precedent for allowing. It seems to me that the kind of tax contemplated by the bankruptcy statute is one that is a lien on the property out of which the collection is to be made, and it can hardly be claimed that one State has a lien on property out of its jurisdiction.

As regards the tax of 1902, the petition in bankruptcy was filed April 23, 1903 and adjudication was decreed.

The New Jersey statute, section 152, provides that on or before the first Monday of June of each year the appraisers shall fix the amount of the tax "such tax shall therefore become due and payable." Sec. 153 provides "such tax when determined shall be a debt due from such company to the State" etc.

The petition in bankruptcy was filed before June 1903, and the bankruptcy form No. 31, provides that the claim must be due at the time of filing the bankruptcy petition.

Here, by the language of the statute of New Jersey it was not a debt before the appraisers acted. I therefore disallow the claim for the year 1903.

I therefore sustain objection No. 6 ante.

I find that the State is entitled to be allowed as a general creditor the sum of $4250 for the year 1902, plus interest to the date of bankruptcy amounting to $669.93, and also the sum of $26.15 costs of the injunction proceeding brought by the State against the company.

10 I therefore allow the claim for the State of New Jersey in the total sum of $4943.08 as a general claim.

Endorsed: No. 9050 In the district court of the United States for the northern district of Illinois. In the matter of *of* Cosmopolitan Power Co. Opinion of Sidney C. Eastman, referee in bankruptcy.

In the District Court of the United States for the Northern District of Illinois.

In the Matter of COSMOPOLITAN POWER Co., Bankrupt. No. —.

This case coming on to be heard on the proof of claim of the State of New Jersey and the objections of the trustee thereto, after hearing evidence and the arguments of counsel, it is hereby ordered that the claim of the State of New Jersey be allowed for the sum of $4943.08 as a general claim and that the claim for priority set up in said proof of claim be denied.

It is further ordered that the claimant and the other parties in interest have fifteen days within which to file a petition for review.

EXHIBIT B—Stipulation of Facts.

EXHIBIT " B."

In the District Court of the United States for the Northern District of Illinois.

In re COSMOPOLITAN POWER COMPANY, Bankrupt. No. 9059.

Stipulation.

It is hereby stipulated by and between the State of New Jersey, claimant, by Moran, Mayer & Meyer, its counsel, and William

11 F. Anderson, as trustee of the Cosmopolitan Power Company, bankrupt, by Wheeler, Silber & Isaacs, his counsel, that the following facts may be admitted as proved upon the hearing of the objections of said trustee, to the claim of the State of New Jersey, subject to all objections, as to competency, relevancy and materiality.

1. That on January 1, 1902, the said Cosmopolitan Power Company was a corporation, organized and existing under the laws of

the State of New Jersey, with a capital stock of forty million dollars, of which, on said day, ten million dollars was issued and outstanding.

2. That on the 13th day of May, 1902, pursuant to the laws of the State of New Jersey, the capital stock of said corporation was reduced from forty million dollars to two million five hundred thousand dollars.

3. That on and after the said 13th day of May, 1902, the total capital stock of said corporation issued and outstanding was two million five hundred thousand dollars.

4. That the said corporation never owned or had any property within the said State of New Jersey, since January 1st, 1902.

5. That the said corporation has not paid to the said State of New Jersey, any franchise taxes or license fees for the years 1902 and 1903.

6. That an involuntary petition in bankruptcy was filed against said Cosmopolitan Power Company, in the district court of the United States, for the northern district of Illinois, on the 23'd day of April, A. D. 1903, and that said corporation was thereafter duly adjudicated a bankrupt by said court.

MORAN, MAYER & MEYER,
Counsel for Claimant.
WHEELER, SILBER & ISAACS,
Counsel for Trustee.

Dated Chicago, February 13, 1904.

Endorsed: 9059. District court of the United States. Cosmopolitan Power Co., bankrupt. Stipulation. Filed M'ch 9, 1904, 10:30 a. m. Sidney C. Eastman, referee.

12 EXHIBIT C—Petition for Review.

EXHIBIT "C."

UNITED STATES OF AMERICA, }
Northern District of Illinois, } ss:

In the United States District Court in and for the Northern District of Illinois. In Bankruptcy.

In re COSMOPOLITAN POWER CO., Bankrupt. 9059.

To the Honorable Sidney C. Eastman, referee:

Your petitioner, The State of New Jersey, represents that on the 22nd day of December, A. D. 1903, your petitioner filed a claim against the said Cosmopolitan Power Co., a bankrupt, for the sum of $9254.90; that said claim was for franchise taxes levied by the State of New Jersey against said Cosmopolitan Power Co., bankrupt, for

the years 1902 and 1903, including interest thereon and costs of injunction proceedings on account of non-payment of said franchise taxes.

Your petitioner further represents that a motion was made on behalf of the State of New Jersey for an order upon the trustee to pay the said taxes as aforesaid, legally due and owing by said Cosmopolitan Power Co. to said State of New Jersey, in advance of the payment of dividends to the creditors of said bankrupt estate, and that your honor refused to enter such order.

Your petitioner further represents that on the 4th day of January, A. D. 1904, the trustee of said estate, William F. Anderson, filed objections to said claim of the State of New Jersey.

Your petitioner further represents that on the 4th day of February, 1904, said objections came up for hearing before your honor; that there were introduced in evidence, on behalf of this petitioner and in support of its claim, the following documentary proof:

1. Exemplified copy of certificate of incorporation of the Cosmopolitan Power Co.

2. Exemplified copy of certificate of board of assessors as
13 to assessment against the Cosmopolitan Power Co. for the year 1902.

3. Exemplified copies of assessments as a franchise tax against said Cosmopolitan Power Co. for the years 1902 and 1903.

4. Exemplified copy of return of board of assessors for purposes of assessment against said Cosmopolitan Power Co. for the year 1903.

Upon said hearing it was also stipulated between the parties that said Cosmopolitan Power Co. has not now and has not since January 1, 1902 had any property of any kind in said State of New Jersey. After argument of counsel, your honor took said matter under advisement and on February 26, 1904, the following order was entered by your honor.

"This case coming on to be heard on the proof of claim of the State of New Jersey and the objections of the trustee thereto, after hearing evidence and the arguments of counsel, it is hereby ordered that the claim of the State of New Jersey be allowed for the sum of $4943.08, as a general claim and that the claim of priority set up in said proof of claim be denied.

It is further ordered that the claimant and the other parties in interest, have fifteen days within which to file a petition for review."

Now comes the said State of New Jersey, by Moran, Mayer & Meyer, its attorneys, and objects and excepts to said order, and prays that your honor may certify this petition to his honor, Judge Christian C. Kohlsaat, judge of said court, for the purpose of having his honor review the order entered herein on February 26, 1904, by your honor, for the following reasons:

1. For that your honor erred in holding that said franchise tax

was not such a claim as was entitled to priority under section 64 (A) of the bankruptcy act of 1898.

2. For that your honor erred in not ordering the trustee, William F. Anderson, to pay the taxes legally due and owing by said Cosmopolitan Power Co. to said State of New Jersey, in advance of the payment of dividends to creditors of said estate.

3. For that your honor erred in allowing the claim of the State of New Jersey merely as a general claim for the sum of $4943.08.

4. For that your honor erred in not allowing the claim
14 of the State of New Jersey as a preferred claim for the sum of $9254.90.

5. For that your honor erred in holding that the franchise tax assessed against said Cosmopolitan Power Co. for the year 1902, amounting to $5750.00, including interest thereon from the 1st day of July, 1902, to October 15, 1903, being $891.25, was not such a claim as was entitled to priority under section 64 (A) of the bankruptcy act of 1898.

6. For that your honor erred in holding that the franchise tax assessed against said Cosmopolitan Power Co. for the year 1903, amounting to $2500., including interest thereon, from the 1st day of July, 1903, to October 15, 1903, being $87.50, was not such a claim as was entitled to priority under section 64 (A) of the bankruptcy act of 1898.

7. For that your honor erred in holding (even if said claim should be denied priority) that it should be allowed as a general claim only for the sum of $4943.08.

Wherefore, this claimant prays that your honor may certify this petition for review to his honor, Judge Christian C. Kohlsaat.

STATE OF NEW JERSEY,
By MORAN, MAYER & MEYER,
Its Attorneys.

MORAN, MAYER & MEYER,
Attorneys for Claimant.

Endorsed: No. 9095. United States district court, northern district of Illinois. In bankruptcy. *In re* Cosmopolitan Power Co. bankrupt. Petition for review. Filed March 9, 1904 at 12:30 p. m. Sidney C. Eastman, referee.

Endorsed: No. 9059. In the district court of the United States for the northern district of Illinois. In the matter of Cosmopolitan Power Co., bankrupt. Cert. for review. Sidney C. Eastman, referee in bankruptcy. Filed Mar. 12, 1904, at 11 o'clock a. m. T. C. MacMillan, clerk.

And afterwards, to wit, on the 15th day of March, A. D. 1904, there was filed in the clerk's office of said court, in the above entitled cause, a supplemental certificate for review, same being in the words and figures following, to wit:

15 Supplemental Certificate for Review, Filed March 15, 1904.

In the District Court of the United States for the Northern District of Illinois.

In the Matter of COSMOPOLITAN POWER CO., Bankrupt. No. 9059.

Honorable C. C. Kohlsaat, judge of said court:

I hereby certify that the attached exhibits, consisting of the proof of claim of the State of New Jersey, and Exhibits A, B, C, D and E constitute all the evidence offered in support of the claim of the State of New Jersey herein. This certificate is supplementary to my certificate for review filed herein on March 12th, 1904.

Respectfully submitted,

SIDNEY C. EASTMAN,
Referee in Bankruptcy.

Proof of Claim of State of New Jersey.

In the District Court of the United States for the Northern District of Illinois, Northern Division. In Bankruptcy.

In the Matter of COSMOPOLITAN POWER COMPANY, Bankrupt.

UNITED STATES OF AMERICA,
State of New Jersey, District of New Jersey, } ss:

At Trenton, New Jersey, district of New Jersey, on the twenty-seventh day of October, A. D. nineteen hundred and three, came J. Willard Morgan, comptroller of the treasury of the State of New Jersey, and made oath that he is comptroller as aforesaid and that he is duly authorized to make this proof, and says further that the said Cosmopolitan Power Company is justly and truly

16 indebted to said State of New Jersey in the sum of nine thousand two hundred and fifty four dollars and ninety cents for franchise taxes levied by the State of New Jersey for the years nineteen hundred and two and nineteen hundred and three, under the provisions of an act of the legislature of said State entitled "An act to provide for the imposition of State taxes upon certain corporations and for the collection thereof," approved April eighteenth, eighteen hundred and eighty-four, and the acts supplementary thereto, together with interest and costs which have accrued on said taxes under the provisions of the act aforesaid, amounting in the whole to the sum aforesaid, a statement of said taxes, interest and costs being hereto annexed; that no note has been received for said debt nor any judgment rendered thereon and that no part of said debt has been paid.

J. WILLARD MORGAN.

Subscribed and sworn to before me at Trenton, this 27th day of October, 1903.

OWEN W. KITE,
N. P. of N. J.

[NOTARIAL SEAL.]

Statement.

Tax..... 1902.....	$5,750.00
Interest to October 15, 1903	891.25
Costs on injunction proceedings because of non-payment of taxes.....	26.15
Tax..... 1903.....	2,500.00
Interest to October 15, 1903.....	87.50
	$9,254.90

In the district court of the United States for the northern district of Illinois, northern division. In the matter of Cosmopolitan Power Co. bankrupt. Proof of claim of the State of New Jersey. Filed Dec. 21st, 1903, at 11 a. m. Sidney C. Eastman, referee. Moran, Mayer & Meyer, attorneys.

EXHIBIT A—Certificate of Board of Assessors as to 1902 Tax.

TRENTON, N. J., February 8, 1904.

I, Irvine E. Maguire, secretary of the State board of assessors of the State of New Jersey, do hereby certify that the Cosmopolitan Power Company, a corporation duly organized and existing under the laws of the State of New Jersey, having failed to make
17 the annual return to said board required by law on or before the first Tuesday of May, 1902, upon the blank form sent for the purposes of such return to the registered New Jersey agent of said corporation, the State board of assessors did, on the seventh day of November, nineteen hundred and two (1902), levy and report to the State comptroller an assessment against the said Cosmopolitan Power Company, in default of the return as required: said State board of assessors having ascertained and fixed the amount of the annual license fee or franchise tax at the sum of five thousand seven hundred and fifty dollars ($5,750.00), in such manner as was deemed by them most practicable, the same being based upon the best information obtainable by the State board of assessors, the amount fixed being the sum of five thousand seven hundred and fifty dollars ($5,750.00).

IRVINE E. MAGUIRE.

STATE OF NEW JERSEY,
Department of State.

I, S. D. Dickinson, secretary of the State of New Jersey, do hereby certify, that Irvine E. Maguire, Esquire, who hath signed the forego-

ing certificate, was, at the doing thereof, and now is secretary of the State board of assessors in and for the State of New Jersey, duly appointed, commissioned and sworn according to law, and that full faith and credit are to be given to his official attestations; and that the said signature is in the proper handwriting of the said Irvine E. Maguire.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Trenton, this eighth day of February, A. D. 1904.

S. D. DICKINSON,
Secretary of State.

[SEAL.]

STATE OF NEW JERSEY:

I, Franklin Murphy, governor of the State of New Jersey, do hereby certify that S. D. Dickinson, Esquire, who hath signed the annexed certificate, and whose official seal is thereto annexed, was, at the doing thereof, and now is, secretary of state of the
18 State of New Jersey, duly appointed, commissioned and sworn, and that full faith and credit are to be given to his official attestations; that the said signature is in the proper handwriting of the said S. D. Dickinson, and the seal his seal of office, and that the said certificate is in due form of law and by the proper officer.

In testimony whereof, I have hereunto set my hand and caused the great seal of the State of New Jersey to be hereunto affixed at the city of Trenton in said State, this eighth day of February, in the year of our Lord one thousand nine hundred and four and of the Independence of the United States the one hundred and twenty-eighth.

[GREAT SEAL.] FRANKLIN MURPHY.

Endorsed: Certificate of sec'y of State b'd of assessors as to 1902 tax. Ex. A. *In re* Cosmopolitan Power Co., b'k'pt. Filed Feb. 12, 1904, at 10 a. m. Sidney C. Eastman, referee.

EXHIBIT B—Certified Copies of Assessments for 1902 and 1903.

STATE OF NEW JERSEY:

Office of Comptroller of the Treasury.

TRENTON, Feb. 8th, 1904.

Certificate.

I hereby certify that the following are true copies of the assessments levied against the Cosmopolitan Power Company, for the years 1902 and 1903. I also certify that I have no official seal.

J. WILLARD MORGAN,
Comptroller of the Treasury.

SCHEDULE No. 7

Filed Nov. 7th, 1902.

For Taxes of 1902.

Office of the State Board of Assessors.

TRENTON, NEW JERSEY, Nov. 7th, 1902.

Hon. J. Willard Morgan, comptroller of the State of New Jersey:

In pursuance of the provisions of an act of the legislature entitled, "An act to provide for the imposition of State taxes upon certain corporations and for the collection thereof," approved April 18th, 1884, and the various supplements and amendments thereto, the State board of assessors hereby certifies and reports to you a statement showing basis of tax for the year 1902, as returned by each corporation, or as ascertained by said board, and the amount of tax due thereon respectively at the rates fixed by law.

JNO. C. RANKIN, JR., President,
ROBERT S. GREEN,
S. J. MEEKER,
DAVID BAIRD,
State Board of Assessors.

IRVINE E. MAGUIRE, Secretary.

Name of Company.	Address.	Capital Stock.	Tax.
Cosmopolitan Power Co.	Chas. N. King, 243 Washington St., Jersey City N. J.	$40,000,000.00	$5,750.00

STATE OF NEW JERSEY:

Office of Comptroller of the Treasury.

Cer. # 2. Trenton.
Schedule No. 1. Filed June 1st, 1903.

For Taxes of 1903.

Office of the State Board of Assessors.

TRENTON, NEW JERSEY, June 1st, 1903.

Hon. J. Willard Morgan, comptroller of the State of New Jersey:

In pursuance of the provisions of an act of the legislature entitled, "An act to provide for the imposition of State taxes upon certain corporations and for the collection thereof," approved April 18th,

1884, and the various supplements and amendments thereto, the State board of assessors hereby certifies and reports to you a statemen showing basis of tax for the year 1903, as returned by each corporation, or as ascertained by said board, and the amount of tax due thereon respectively at the rates fixed by law.

DAVID BAIRD, President.
ROBERT S. GREEN,
S. J. MEEKER,
THEODORE STRONG,
State Board of Assessors.

IRVINE E. MAGUIRE, Secretary.

Name of Company.	Address.	Capital Stock.	Tax.
Cosmopolitan Power Co.	Chas. N. King, Jersey City, N. J.	$2,500,000.00	$2,500.00

20 STATE OF NEW JERSEY,
Department of State.

I, S. D. Dickinson, secretary of state of the State of New Jersey, do hereby certify, that J. Willard Morgan, Esquire, who hath signed the foregoing certificate, was, at the doing thereof, and now is comptroller in and for the State of New Jersey duly appointed, commissioned and sworn according to law, and that full faith and credit are to be given to his official attestations; and I further certify, that the said signature is in the proper handwriting of the said J. Willard Morgan.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at Trenton, this eighth day of February, A. D. 1904.

[SEAL.]

S. D. DICKINSON,
Secretary of State.

STATE OF NEW JERSEY:

I, Franklin Murphy, governor of the State of New Jersey, do hereby certify that S. D. Dickinson, Esquire, who hath signed the annexed certificate, and whose official seal is thereto annexed, was, at the doing thereof, and now is, secretary of state of the State of New Jersey, duly appointed, commissioned and sworn, and that full faith and credit are to be given to his official attestations; that the said signature is in the proper handwriting of the said S. D. Dickinson, and the seal his seal of office, and that the said certificate is in due form of law and by the proper officer.

In testimony whereof, I have hereunto set my hand and caused the great seal of the State of New Jersey to be hereunto affixed at

the city of Trenton, in said State, this eighth
By the Governor. day of February, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-eighth.
[SEAL.] FRANKLIN MURPHY.

S. D. DICKINSON,
Secretary of State.

Endorsed: Copies of the assessments for 1902 and 1903. Ex. B. *In re* Cosmopolitan Power Co., bkpt. Filed Feb. 12, 1904, at 10 a. m. Sidney C. Eastman, referee.
(10c. internal revenue stamp cancelled.)

21 EXHIBIT C—Certificate of Incorporation of Cosmopolitan Power Co.

Certificate of Incorporation of Cosmopolitan Power Company.

This is to certify that we, the undersigned, do hereby associate ourselves into a corporation under and by virtue of the provisions of an act of the legislature of the State of New Jersey, entitled "An act concerning corporations" (revision of 1896), and the several acts supplemental thereto and amendatory thereof, and do severally agree to take the number of shares of capital stock set opposite our respective names.

First. The name of the corporation is Cosmopolitan Power Company.

Second. The location of its principal office in the State of New Jersey, is at No. 243 Washington street, in the city of Jersey City, in the county of Hudson. The name of the agent therein and in charge thereof and upon whom process against this corporation may be served, is Charles N. King.

Third. The objects for which and for any of which the corporation is formed are:

To manufacture, own, operate, handle, deal in, buy and sell engines, power machines and vehicles of every kind and nature and all parts thereof, and all materials, apparatus and articles used in the construction thereof or in connection therewith; to own land, or otherwise hold, buy, sell and deal in lands suitable for manufacturing purposes; also to own lands or otherwise hold, to buy and sell lands, buildings suitable for storing, manufacturing, operating, handling, dealing in or utilizing in any manner whatsoever engines or any machine for the development of power; to deal in, produce, to build, purchase or lease or otherwise hold houses, buildings or manufacturing property of any description necessary for the conduct of the business herein contemplated including the buying and selling or otherwise disposing of the same; to manufacture, purchase or otherwise acquire, to hold, mortgage, pledge, sell, assign and transfer or otherwise dispose of, to invest, trade, deal in, and deal with products,

materials, goods, wares and merchandise and property of every class and description; to purchase, lease or otherwise acquire all or any part of the good will, business and assets and to undertake
22 all or any part of the liabilities of any person, firm, association or corporation now or hereafter engaged in the handling of engines, power machines or vehicles, or the manufacture of any such product and to pay for the same in cash, bonds or otherwise; to apply for, purchase or otherwise acquire any and all inventions, processes and patters patent covering the same used in connection with the business herein contemplated; to assume in whole or in part the contracts and contractual obligations of every nature, kind or description of any firm, person, association or corporation engaged in — connected with the manufacture or handling of engines, power machines or vehicles; to guarantee the contracts and contractual obligations of every nature and kind whatsoever of any such person, firm, association or corporation; to purchase and deal in, hold and in any manner acquire all or any portion of the capital stock of any corporation, to vote the same or control and utilize the same to the same extent and with the same rights and privileges as a natural person might or could do; to have one or more offices and to carry on all or any part of its operations and business without the State of New Jersey; to buy and own bonds, mortgages, stocks, or to trade in the same; to hold, purchase, mortgage, lease and convey real and personal property in any State or Territory of the United States and in any foreign country or place and in general to do any and all acts or things necessary to further the objects above enumerated with all the powers conferred by the laws of the State of New Jersey upon corporations under the acts herein referred to.

The corporation shall also have power to conduct its business in all its branches, have one or more offices, and unlimitedly to hold, purchase, mortgage and convey real and personal property in any State, Territory, or colony of the United States and in any foreign country or place.

Fourth. The total authorized capital stock of this corporation is forty million dollars ($40,000,000) divided into four hundred thousand ($400,000) shares, of the par value of one hundred dollars ($100) each.

Fifth. The names of the incorporators, the post office address of each, and the number of shares subscribed for by each, the aggregate of which subscriptions ($3,000.00) is the amount of capital stock with which this corporation will commence business, are as follows:

23

Name.	Post office address.	Number of shares.
George E. Hargrave,	243 Washington street, Jersey City, New Jersey,	28
Henry E. Mattison,	243 Washington street, Jersey City, New Jersey,	1
William H. Wilson, Jr.,	243 Washington street, Jersey City, New Jersey,	1

Sixth. The duration of the corporation shall be unlimited.

Seventh. The corporation may use and apply its surplus earnings, or accumulated profits authorized by law to be reserved, to the purchase or acquisition of property, and to the purchase or acquisition of its own capital stock from time to time, to such extent and in such manner and upon such terms as its board of directors shall determine; and neither the property nor the capital stock so purchased and acquired nor any of its capital stock taken in payment or satisfaction of any debt due to the corporation shall be regarded as profits for the purpose of declaration or payment of dividends, unless so determined by a majority of the board of directors, or a majority of the stockholders.

The corporation, in its by-laws, may prescribe the number necessary to constitute a quorum of the board of directors, which number may be less than a majority of the whole number.

The number of directors may be altered at any time by vote of the board of directors, and in case of any increase thereof the board of directors shall have power to elect such additional directors to hold office until the next meeting of stockholders, or until their successors shall be elected.

The board of directors shall have power, without the assent or vote of the stockholders, to make, alter, amend and re-cind the by-laws of the corporation, to fix the amount to be reserved as working capital, to authorize and to cause to be executed mortgages and liens upon the real and personal property of the corporation, and from time to time to sell, assign, transfer or otherwise dispose of any or all of the property of the corporation; but no such sale of all the property shall be made except pursuant to the vote of at least two thirds of the board of directors.

The board of directors, by resolution passed by a majority of the whole board, may designate three or more directors to con-
24 stitute an executive committee, which committee to the extent provided in said resolution or in the by-laws of the corporation, shall have, and may exercise the power of the board of directors in the management of the business and affairs of the corporation, and shall have power to authorize the seal of the corporation to be affixed to all papers which may require it.

The board of directors from time to time shall determine whether and to what extent, and at what times and places and under what conditions and regulations, the accounts and books of the corporation, or any of them shall be open to the inspection of the stockholders; and no stockholder shall have any right of inspecting any account or book or document of the corporation, except as conferred by statute or authorized by the board of directors, or by resolution of the stockholders.

The board of directors shall have power to hold its meetings, to have one or more offices, and to keep the books of the corporation (except the stock and transfer books) outside of this State, at such places as may be from time to time designated by them.

In witness whereof, we do hereby make, record and file this certificate, and have set our hands and seals in the city of New York, this 30th day of April, 1900.

GEORGE E. HARGRAVE. L. S.
HENRY E. MATTISON. L. S.
WILLIAM H. WILSON, JR. L. S.

Signed, sealed and delivered in the presence of:
WM. H. FAIN.

STATE OF NEW YORK, }
County of New York, } ss:

On this 30th day of April, 1900, before the undersigned William H. Fain, a commissioner of deeds for the State of New Jersey residing in the State of New York, personally came George E. Hargrave, Henry E. Mattison and William H. Wilson, Jr., to me personally known and known to me to be the individuals named in and who executed the foregoing certificate of incorporation and I having first made known to them the contents thereof, they did each
25 acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

WM. H. FAIN,
A Commissioner of Deeds for the State of
[SEAL.] New Jersey, Residing in New York.

(10c. internal revenue stamp cancelled.)

Endorsed: "Received in the Hudson Co., N. J. clerk's office April 30th A. D. 1900 and recorded in clerk's record No. — on page — Maurice J. Stack, clerk."

Endorsed: "Filed Apr. 30 1900 George Wurts secretary of state."

STATE OF NEW JERSEY, }
Department of State. }

I, S. D. Dickinson, secretary of state of the State of New Jersey, do hereby certify that the foregoing is a true copy of the certificate of incorporation of Cosmopolitan Power Company, and the endorsements thereon, as the same is taken from and compared with the original filed in my office on the thirtieth day of April A. D. 1900, and now remaining on file therein.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Trenton, this eighth day of February, A. D. 1904.

S. D. DICKINSON,
[SEAL.] Secretary of State.

Certified copy of certificate of incorporation of Cosmopolitan Power Company.

STATE OF NEW JERSEY:

I, Franklin Murphy, governor of the State of New Jersey, do hereby certify that S. D. Dickinson, Esquire, who hath signed the annexed certificate, and whose official seal is thereto annexed, was, at the doing thereof, and now is, secretary of state of the State of New Jersey, duly appointed, commissioned and sworn, and that full faith and credit are to be given to his official attestations;
26 that the said signature is in the proper handwriting of the said S. D W. Dickinson, and the seal his seal of office, and that the said certificate is in due form of law and by the proper officer.

In testimony whereof, I have hereunto set my hand and caused the great seal of the State of New Jersey to be hereunto affixed, at the city of Trenton, in said State, this eighth day of February, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-eighth.

By the Governor,
S. D. Dickinson,
Secretary of State.

[SEAL.] FRANKLIN MURPHY.

Endorsed: Ex. C. *In re* Cosmopolitan Power Co., bkpt. Filed Febr. 12, 1904 at 10 a. m. Sidney C. Eastman, referee.

EXHIBIT D—Motion of State of New Jersey.

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the United States District Court in and for the Northern District of Illinois, Northern Division Thereof.

In re COSMOPOLITAN POWER CO., Bankrupt. No. —. In Bankruptcy.

Re Claim of State of New Jersey for Preference.

Now comes the State of New Jersey, by Moran, Mayer & Meyer, its attorneys, and respectfully moves the court for an order upon the trustee herein to pay the taxes legally due and owing by said bankrupt to the State of New Jersey, as per the claim of said State
27 of New Jersey filed herein, in advance of the payment of dividends to the creditors of said estate.

Respectfully submitted.

STATE OF NEW JERSEY,
By MORAN, MAYER & MEYER,
Its Attorneys.

Endorsed: Ex. D. U. S. district court, northern district of Illinois. Northern division thereof. Cosmopolitan Power Co. bankrupt. Motion of State of New York. Filed Feb. 12, 1904, at 10 a. m. Sidney C. Eastman, referee.

EXHIBIT E—Return of Cosmopolitan Power Co. for 1903.

Copy.

Report of the Cosmopolitan Power Co.

G. E. Highley, President. J. F. Hetherington, Treasurer, Secretary.

Date of incorporation: April 1900.
Principal office in New Jersey.
City or town: Jersey City, N. J.
Street and number: 243 Washington St.
Name of agent in charge: Chas. N. King.

This report is required by the State board of assessors of New Jersey under the provisions of chapter 9, Laws of 1901, "A further supplement to an act entitled 'An act to provide for the imposition of State taxes upon certain corporations and for the collection thereof,' approved April eighteenth, one thousand eight hundred and eighty-four," approved February 19th, 1901, and in accordance with said act this report must be filed with said board on or before the first Tuesday of May annually.

"All corporations incorporated under the laws of this State, other than those which are subject to the payment of a State franchise tax assessed upon the basis of gross receipts, shall make annual report to the State board of assessors on or before the first Tuesday of May in each year, and shall state therein the amount of the capital stock of such corporation issued and outstanding on the first day of January preceding the making of said return, together with such other information as may be required by said board to carry out
28 the provisions of this act, and shall pay an annual license fee or franchise tax of one tenth of one per-centum on all amounts of capital stock issued and outstanding up to and including the sum of three million dollars; on all sums of capital stock issued and outstanding in excess of three million dollars and not exceeding five million dollars, an annual license fee or franchise tax of one twentieth of one percentum, and the further sum of fifty dollars per annum per one million dollars or any part thereof, on all amounts of capital stock issued and outstanding in excess of five million dollars; provided that this act shall not apply to railway, canal or banking corporations, or to savings banks, cemeteries or religious corporations or purely charitable or purely educational associations not conducted for profit, or manufacturing or mining corporations at least fifty per centum of whose capital stock issued and outstand-

ing is invested in mining or manufacturing carried on within this State, and which mining or manufacturing corporations shall have stated in the annual return to the State board of assessors where the mine or manufacturing establishment of such corporation or corporations is or are located, the character of the ores mined or the goods manufactured, the total amount of its capital stock embarked in the business of mining or manufacturing and the amount of capital stock actually employed in New Jersey in carrying on such mining or manufacturing business; if any manufacturing or mining company carrying on business in this State shall have less than fifty per centum of its capital stock, issued and outstanding, invested in business carried on within this State, such company shall pay the annual license fee or franchise tax herein provided for companies not carrying on business in this State, but shall be entitled, in the computation of such tax, to a deduction from the amount of its capital stock issued and outstanding of the assessed value of its real and personal estate so used in manufacturing or mining."

After the tax has been levied by the State board of assessors any corporation which desires to appeal to said board for a review of the assessment and a readjustment of the tax so levied must file with said board within three months from the date of assessment a petition of appeal, duly verified according to law, stating specifically the grounds upon which the appeal is taken, and the reasons why
29 the tax is considered excessive and unjust. If the petition of appeal is not filed within three months, the right of appeal to the State board shall be considered and treated as having been waived and the amount of tax levied shall be payable and collected as other taxes levied by said board. P. L. 1897, chapter 98.

Office State Board of Assessors.

TRENTON, NEW JERSEY.

This report must show existing conditions January 1st, 1903. All of the following questions must be answered, and wherever the proper answer is "none" or "nothing," it should be so stated.

1. What is the amount of your capital stock authorized? $2,500,000.00.

2. Into how many shares is it divided? 25,000.

3. How many shares are fully paid, either in cash or by property purchased? All.

4. How many shares are partially paid? None.

5. What is the amount of your capital stock issued? $2,500,000.00.

6. What is the nature of the business of your corporation? Mfg. Selling engines, power m'ch'y etc.

7. Is your corporation engaged in manufacturing or mining? Manufacturing.

8. If so, state where.

A. In New Jersey, ——. City or town, ——. Street and number, ——.

B. If in other places, state where, city or town, Chicago, Ill. Street and number, 4013–4023 Wentworth Ave.

9. What is the total amount of your capital stock invested in manufacturing or mining? All.

10. What is the amount of your capital stock actually employed in manufacturing or mining in New Jersey? None.

11. What is the local assessed valuation for 1902, of your corporation's real and personal estate used in manufacturing or mining in New Jersey?

Real estate none.

Personal, none.

I, the undersigned, do hereby certify as treasurer of the
30 Cosmopolitan Power Company, that the foregoing return is correct and true.

(Signed) STEWART D. HANK, [L.S.]

Address, Jersey City, N. J., 243 Washington Street.

(Signed) E. P. STONINGTON, Witness.

The above certificate is made in conformity with section 3 of the act of April 18th, 1884, which provides that if any officer of any company required by this act to make a return, shall in such return make a false statement, he shall be deemed guilty of perjury.

TRENTON, N. J., Feb. 8, 1904.

I, Irvine E. Maguire, secretary of the State board of assessors of the State of New Jersey, do hereby certify that the within is a true copy of the annual return made by the Cosmopolitan Power Company to said State board of assessors for purposes of taxation for the year nineteen hundred and three, as the same remains of record in said office of State board of assessors of New Jersey. I further certify that upon the return so made the State board of assessors did, on the first day of June, 1903, levy and report to the State comptroller a tax of $2,500.00, being at the rate of one-tenth of one per centum upon the amount of capital stock issued; to wit, upon the sum of $2,500,000.00.

I also certify that I have no official seal.

IRVINE E. MAGUIRE.

(Copy) 1903. M. C. Cosmopolitan Power Co. Filed May 2, 1903. Basis of assessment. Capital stock $—. Tax, $—.

This return must be sent addressed to the State board of assessors, Trenton, N. J. Before the first Tuesday in May.

STATE OF NEW JERSEY,
Department of State.

I, S. D. Dickinson, secretary of the State of New Jersey, do hereby certify, that Irvine E. Maguire, Esquire, who hath signed the fore-

going certificate, was, at the doing thereof, and now is secretary of the State board of assessors in and for the State of New Jersey, duly appointed, commissioned and sworn according to law, and
31 that full faith and credit are to be given to his official attestations; and I further certify that the said signature is in the proper handwriting of the said Irvine E. Maguire.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Trenton, this eighth day of February, A. D. 1904.

[SEAL.] S. D. DICKINSON,
Secretary of State.

STATE OF NEW JERSEY:

I, Franklin Murphy, governor of the State of New Jersey, do hereby certify that S. D. Dickinson, Esquire, who hath signed the annexed certificate, and whose official seal is hereto annexed, was, at the doing thereof, and now is secretary of the State of New Jersey, duly appointed, commissioned and sworn, and that full faith and credit are to be given to his official attestations; that the said signature is in the proper handwriting of the said S. D. Dickinson, and the seal his seal of office, and that the said certificate is in due form of law and by the proper officer.

In testimony whereof, I have hereunto set my hand and caused the great seal of the State of New Jersey to be hereunto affixed at the city of Trenton in said State, this eighth day of February, in the year of our Lord one thousand nine hundred and four and of the Independence of the United States the one hundred and twenty-eighth.

[GREAT SEAL.] FRANKLIN MURPHY.

By the governor,

S. D. DICKINSON,
Secretary of State.

Endorsed: Ex. E. Return for 1903. *In re* Cosmopolitan Power Co., b'k'pt. Filed Febr. 12, 1904, at 10 a. m. Sidney C. Eastman, referee.

Endorsed: No. 9059. In the district court of the United States for the northern district of Illinois. In the matter of Cosmopolitan Power Co., bankrupt. Sup. cert. for review. Sidney C. Eastman, referee in bankruptcy. *Re* cl'm of New Jersey. Filed Mar. 15, 1904 at 10 o'clock a. m. T. C. MacMillan, clerk.

32 And afterwards, to wit, on the 12th day of September, A. D. 1904, the following order was had and entered of record, in said cause, before the Hon. Christian C. Kohlsatt, judge, to wit:

Order of Sept. 12, 1904, Confirming and Approving Order of Referee.

In re COSMOPOLITAN POWER COMPANY, Bankrupt. 9059.

This matter coming on to be heard on the certificate of review filed by Referee Sidney C. Eastman, at the petition of the State of New Jersey, for a review of the order of said referee, upon the claim of said State of New Jersey, and the court having heard argument of counsel and being fully advised in the premises, it is—

Ordered that the finding and order of said referee in the matter of the claim of said State of New Jersey be and the same is hereby confirmed and approved; to which ruling of the court said State of New Jersey, by its solicitors, duly excepts and enters its motion for an appeal, whereupon the court fixes the amount of the appeal bond at the penal sum of $300.00.

And afterwards, to wit, on the 19th day of September, A. D. 1904, there was filed in the clerk's office of said court, in the above entitled cause, a petition for appeal, same being in the words and figures following, to wit:

33 Petition for Appeal. Filed Sept. 19, 1904.

UNITED STATES OF AMERICA, Northern District of Illinois, } ss:

In the United States District Court in and for the Northern District of Illinois, Northern Division Thereof. In Bankruptcy.

In re COSMOPOLITAN POWER COMPANY, Bankrupt. No. 9059.

To the honorable district court of the United States, northern district of Illinois, northern division:

The State of New Jersey, a creditor herein, feeling itself aggrieved by the order made and entered on the 12th day of September, 1904, in the above entitled cause, does hereby appeal from said order and decree to the United States circuit court of appeals for the seventh circuit, for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed, and that the amount of the bond upon appeal shall be fixed by this court, and that a transcript of the proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the seventh circuit.

STATE OF NEW JERSEY,
By MORAN, MAYER & MEYER, Its Att'ys.

Chicago, September 19th, 1904.

Endorsed: No. 9059. United States district court, northern district of Illinois, northern division. *In re* Cosmopolitan Power Co., bankrupt. Petition for appeal. Filed Sep. 19, 1904 at 10 o'clock a. m. T. C. MacMillan, clerk. Moran, Mayer & Meyer, Chicago.

34 And afterwards to wit, on the 19th day of September, A. D. 1904, there was filed in the clerk's office of said court, in the above entitled cause, assignments of error, same being in words and figures following, to wit:

Assignment of Errors. Filed Sept. 19, 1904.

UNITED STATES OF AMERICA, Northern District of Illinois, } ss:

In the United States District Court in and for the Northern District of Illinois, Northern Division Thereof. In Bankruptcy.

In re COSMOPOLITAN POWER COMPANY, Bankrupt. No. 9059.

Assignment of Errors by the State of New Jersey.

And now comes the State of New Jersey and files herein the following assignment of errors upon which it will rely upon its appeal from the order made and entered by this honorable court on the 12th day of September, 1904, in the above entitled cause, being that certain order entered herein on the claim of said State of New Jersey, confirming and approving the finding and order of the referee thereon:

1. For that the court erred in holding that said franchise tax was not such a claim as was entitled to priority under section 64 (A) of the bankruptcy act of 1898.

2. For that the court erred in not ordering the trustee, William F. Anderson, to pay the taxes legally due and owing by said Cosmopolitan Power Company to said State of New Jersey, in advance of the payment of dividends to creditors of said estate.

3. For that the court erred in allowing the claim of the State of New Jersey merely as a general claim, for the sum of $4943.08, and not as a preferred claim.

4. For that the court erred in not allowing the claim of the State of New Jersey as a preferred claim for the sum of $9254.90.

35 5. For that the court erred in holding that the franchise tax assessed against said Cosmopolitan Power Company for the year 1902, amounting to $5750.00, including interest thereon from the 1st day of July, 1902, to October 15, 1903, being $891.25, was not such a claim as was entitled to priority under section 64 (A) of the bankruptcy act of 1898.

6. For that the court erred in holding that the franchise tax as-

sessed against said Cosmopolitan Power Company for the year 1903, amounting to $2500.00, including interest thereon, from the 1st day of July, 1903, to October 15, 1903, being $87.50, was not such a claim as was entitled to priority under section 64 (A) of the bankruptcy act of 1898.

7. For that the court erred in holding (even if said claim should be denied priority) that it should be allowed as a general claim only, for the sum of $4943.08.

Wherefore, the said State of New Jersey prays that said order of said district court may be reversed and the said cause remanded to said district court, with directions to enter an order allowing the claim of said State of New Jersey as a preferred claim under section 64 (A) of the bankruptcy act of 1898 and amendments thereto, and directing William F. Anderson, trustee of said estate, to pay said claim, and that said trustee pay all the costs of this proceeding.

STATE OF NEW JERSEY,
By MORAN, MAYER & MEYER, Its Att'ys.

Endorsed: No. 9059. United States district court, northern district of Illinois, northern division. *In re* Cosmopolitan Power Co., bankrupt. Assignments of errors. Filed Sep. 19, 1904, at 10 o'clock a. m. T. C. MacMillan, clerk. Moran, Mayer & Meyer, law offices, Unity building, Chicago.

And afterwards, to wit, on the 19th day of September, A. D. 1904, there was filed in the clerk's office of said court, in the above entitled cause, a bond, same being in the words and figures following, to wit:

Bond on Appeal. Filed Sept. 19, 1904.

Know all men by these presents, that we, The State of New Jersey, as principal, and Francis E. Matthews, as surety, are held and
36 firmly bound until William F. Anderson, trustee, in bankruptcy, of the Cosmopolitan Power Company, in the full and just sum of three hundred dollars ($300.), to be paid to said William F. Anderson, trustee in bankruptcy of said Cosmopolitan Power Company, his certain attorneys, executors, administrators, successors or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of September, in the year of our Lord one thousand nine hundred and four.

Whereas, lately at a term of the district court of the United States in and for the northern district of Illinois, northern division, in the matter of the claim of the State of New Jersey, pending in said court against the Cosmopolitan Power Company, an order was entered by said court on the 12th day of September, 1904, confirm-

ing and approving the finding and order of the referee thereon, and said State of New Jersey, having obtained an appeal and filed a copy thereof in the clerk's office of said court, to reverse said order, and a citation directed to said William F. Anderson, trustee, as aforesaid, citing and admonishing him to be and appear at the United States circuit court of appeals, for the seventh circuit, to be holden at Chicago, on the 4th day of October, 1904.

Now, the condition of the above obligation is such, that if the said State of New Jersey shall prosecute its appeal to effect and answer all costs if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

STATE OF NEW JERSEY, [SEAL.]
By MORAN, MAYER & MEYER,
Its Attorneys.
FRANCIS E. MATTHEWS. [SEAL.]

O K.
WHEELER, SILBER & ISAACS,
Att'ys for Trustee.

Approved Sept. 19, 1904.
KOHLSAAT, Judge.

Endorsed: 9059. *In re* Cosmopolitan Power Company, bankrupt. Bond. Filed Sep. 19, 1904 at 10 o'clock a. m. T. C. MacMillan, clerk.

37 And afterwards, to wit, on the 19th day of September, A. D. 1904, the following order was had and entered of record, in said cause, before the Hon. Christian C. Kohlsaat, judge, to wit:

Order of Sept. 19, 1904, Allowing Appeal.

In re COSMOPOLITAN POWER CO., Bankrupt. 9059.

Now comes on to be heard the petition of the State of New Jersey for the allowance of an appeal from the order entered herein on September 12, 1904, in the matter of the claim of said State of New Jersey and upon the petition for such appeal and assignments of error thereon this day filed herein, it appearing to the court that the bond on appeal has been approved and filed, it is hereby

Ordered that said appeal as prayed be and the same is hereby allowed.

Certificate of Clerk.

In the District Court of the United States for the Northern District of Illinois, Northern Division.

I, T. C. MacMillan, clerk of the district court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the proceedings had

in this court in the case entitled *In re* Cosmopolitan Power Company, bankrupt, in bankruptcy No. 9059, prepared in accordance with the præcipe of the solicitors for The State of New Jersey, claimant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office at Chicago, in said district, this 5th day of October, A. D. 1904.

[SEAL.] T. C. MACMILLAN, Clerk.

38 Præcipe for Transcript.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, Northern Division, }

In the United States District Court in and for the Northern District of Illinois, Northern Division Thereof. In Bankruptcy.

In re COSMOPOLITAN POWER CO., Bankrupt. No. 9059.

The clerk will please prepare transcript of the record in the above entitled cause to be transmitted, to the circuit court of appeals for the seventh circuit, and include therein the following:

Plæcipe,
Placita,
Objections by trustee William F. Anderson
Certificate of review by referee Sidney C. Eastman
Supplemental certificate of review by referee Sidney C. Eastman.
Order of Judge Kohlsaat on certificate of review.
Petition for appeal.
Assignment of errors.
Bond on appeal.
Order allowing appeal.
Citation.
Præcipe.

MORAN, MAYER & MEYER,
Attorneys for State of New Jersey.

Endorsed: Filed Sep. 20, 1904, T. C. MacMillan clerk.

39 Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States to William F. Anderson, trustee of the estate of the Cosmopolitan Power Company, bankrupt Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals, for the seventh circuit, to be

holden at Chicago within thirty days from the date hereof, pursuant to a petition for appeal, filed in the clerk's office of the district court of the United States for the northern district of Illinios, wherein The State of New Jersey is appellant and you are appellee, to show cause, if any there be, why the order rendered against the said appellant as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Christian C. Kohlsaat, judge of the district court of the United States for the northern district of Illinois, this 19th day of September, in the year of our Lord one thousand nine hundred and four.

KOHLSAAT,
District Judge.

Service of the within citation accepted this 20th of Sept. 1904.

WHEELER, SILBER & ISAACS,
Att'ys for Wm. F. Anderson, Trustee.

40 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 39, inclusive, contain a true copy of the printed record filed in this court on October 14, 1904, which was prepared for the printer, indexed, supervised and distributed by me in accordance with the rules of this court, and upon which the cause was determined by the United States circuit court of appeals for the seventh circuit, in the case of in the matter of Cosmopolitan Power Company, bankrupt, State of New Jersey, *vs.* William F. Anderson, trustee of the estate of Cosmopolitan Power Co., bankrupt, No. 1122, October term, 1904, as the same remains upon the files and records of the United States circuit court of appeals, for the seventh circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this twenty-second day of May, A. D. 1905.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

41 At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court-rooms, in the city of Chicago in said seventh circuit, on the fourth

day of October, 1904, of the October term in the year of our Lord one thousand nine hundred and four and of our Independence the one hundred and twenty-ninth.

And afterwards, to-wit: on the seventh day of October, 1904, in the October term last aforesaid, came the appellant by its counsel, Mr. Thomas N. McCarter and Mr. Levy Mayer, and filed in the office of the clerk of this court their appearance which appearance is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1904.

In the Matter of COSMOPOLITAN POWER COMPANY, Bankrupt.

STATE OF NEW JERSEY, Appellant,
vs.
WILLIAM T. ANDERSON, Trustee, etc., Appellee. } No. 1122.

The clerk will enter *my* appearance as counsel for the appellant, State of New Jersey.

THOMAS N. McCARTER,
Att'y Gen'l of New Jersey.
LEVY MAYER.

Endorsed: Filed Oct. 7, 1904. Edward M. Holloway, clerk.

42 And afterwards, to-wit: on the first day of November, 1904, in the October term last aforesaid, the following further proceedings were had and entered of *order*, to-wit:

TUESDAY, November 1, 1904.

Court met pursuant to adjournment.
Present: Hon. James G. Jenkins, circuit judge presiding. Hon. Peter S. Grosscup, circuit judge. Hon. Francis E. Baker, circuit judge.

In the Matter of COSMOPOLITAN POWER COMPANY, Bankrupt.

STATE OF NEW JERSEY
vs.
WILLIAM F. ANDERSON, Trustee, etc., } 1122. Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

Upon application for counsel for appellant, it is ordered that the time for filing brief for appellant in this cause, be, and the same is hereby extended to December 1, 1904.

And afterwards, to-wit: on the third day of January, 1905, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, January 3, 1905.

Court met pursuant to adjournment.

43 Present: Hon. James G. Jenkins, circuit judge presiding. Hon. Peter S. Grosscup, circuit judge. Hon. Francis E. Baker, circuit judge.

In the Matter of COSMOPOLITAN POWER CO., Bankrupt.

STATE OF NEW JERSEY
vs.
WILLIAM F. ANDERSON, Trustee, etc.

1122. Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

It is ordered by the court that this cause, be, and the same is hereby set down for hearing February 8, 1905.

And afterwards, to-wit: on the eleventh day of January, 1905, in the October term last aforesaid, there was filed in the office of the clerk of this court, a notice of motion for leave to file brief, which notice is in the words and figures following, to-wit:

STATE OF ILLINOIS,
County of Cook, } *ss:*

In the Circuit Court of Appeals for the Seventh Circuit.

STATE OF NEW JERSEY, Appellant,
vs.
WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Appellee.

No. 1122.

44 To Moran, Mayer & Meyer, attorneys for appellant:

You will please take notice that on Wednesday, January 11, 1905, before the judges of the circuit court of appeals or any of them, in the court room of said court or in chambers, we shall move for leave to file instanter a brief upon one additional point, at which time and place you may appear if you see fit.

Yours, etc., WHEELER, SILBER & ISAACS,
Attorneys for Appellee.

Dated January 10, 1905.

Received copy of the above notice this 10th day of January A. D., 1905.

____ ____,
Attorneys for Appellant.

STATE OF ILLINOIS, }
County of Cook, } ss:

George Harold Warner, being first duly sworn, on oath deposes and says, that he served the within notice on Moran, Mayer & Mayer, by leaving a true copy thereof with the clerk in the office of said Moran, Mayer & Meyer, at about the hour of 3:10 p. m. January 10, 1905.

GEORGE HAROLD WARNER.

Subscribed and sworn to before me this 10th day of January, A. D. 1905.

[SEAL.] EDWARD P. PRINCE,
Notary Public.

Endorsed: Filed Jan. 11, 1905. Edward M. Holloway, clerk.

45 And on, to-wit: the fifth day of January, 1905, in the October term last aforesaid, the following proceedings were had and entered of record, to-wit:

FRIDAY, January 5, 1905.

Court met pursuant to adjournment.

Present: Hon. James G. Jenkins, circuit judge, presiding; Hon. Francis E. Baker, circuit judge; Hon. J. Otis Humphrey, district judge.

Order.

It is ordered by the court that Hon. J. Otis Humphrey, judge of the district court of the United States for the southern district of Illinois, be designated and assigned to sit in this court as a member thereof during the present session. Thereupon said Humphrey appeared and took his seat as a member of said court.

And afterwards, to-wit: on the eleventh day of January, 1905, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

WEDNESDAY, January 11, 1905.

Court met pursuant to adjournment.

Present: Hon. James G. Jenkins, circuit judge, presiding; Hon. Francis E. Baker, circuit judge; Hon. J. Otis Humphrey, district judge.

46 In the Matter of COSMOPOLITAN POWER COMPANY, Bankrupt.

STATE OF NEW JERSEY *vs.* WILLIAM F. ANDERSON, Trustee. } 1122. Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

On motion of counsel for appellee it is ordered that leave be, and the same is hereby granted the appellee in this cause to file an additional brief.

And afterwards, to-wit: on the eighth day of February, 1905, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

WEDNESDAY, February 8, 1905.

Court met pursuant to adjournment.
Present: Hon. James G. Jenkins, circuit judge presiding; Hon. Peter S. Grosscup, circuit judge; Hon. Francis E. Baker, circuit judge.

In the Matter of COSMOPOLITAN POWER COMPANY, Bankrupt.

STATE OF NEW JERSEY *vs.* WILLIAM F. ANDERSON, Trustee, etc. } 1122. Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

47 Now this day come the parties by their counsel and this cause having been partly heard on the printed record and briefs of counsel, and on oral argument by Mr. Levy Mayer, counsel for appellant, the further hearing is continued until ten o'clock to-morrow morning.

And afterwards, to-wit: on the ninth day of February, 1905, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

THURSDAY, February 9, 1905.

Court met pursuant to adjournment.
Present: Hon. James G. Jenkins, circuit judge presiding. Hon. Peter S. Grosscup, circuit judge. Hon. Francis E. Baker, circuit judge.

In the Matter of COSMOPOLITAN POWER COMPANY, Bankrupt.

STATE OF NEW JERSEY *vs.* WILLIAM F. ANDERSON, Trustee, etc.	1122. Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

Now again come the parties by their counsel and this cause now comes on to be heard to conclusion on the printed record and briefs of counsel and on oral argument by Mr. Levy Mayer, counsel for appellant, and by Fred D. Silber, counsel for appellee, and the court having heard the same takes this matter under advisement.

48 And afterwards, to-wit: on the eleventh day of April, 1905, in the October term last aforesaid, there was filed in the office of the clerk of this court the opinion of the court in the above entitled cause, which opinion is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1904, January Session, 1905.

In re COSMOPOLITAN POWER COMPANY, Bankrupt.

STATE OF NEW JERSEY, Appellant, *vs.* WILLIAM F. ANDERSON, Trustee, Appellee.	No. 1122. Appeal from the District Court of the United States, for the Northern district of Illinois, Northern Division.

Before Jenkins, Grosscup, and Baker, Circuit Judges.

The Cosmopolitan Power Company was organized under the incorporation laws of New Jersey on April 30, 1900, for an unlimited period, to make and deal in engines, machines, materials and merchandise of all kinds, anywhere within the United States and its territories and possessions. The company's seat of operations and all of its tangible property were in Illinois. Its authorized capital stock was $40,000,000. The amount thereof issued and outstanding on January 1, 1902, was $10,000,000. On May 13, 1902, the company duly reduced its capital stock to $2,500,000, all of which was then and thereafter outstanding.

The company was adjudged a bankrupt on a petition filed April 23, 1903.

New Jersey filed a claim, and thereafter asked for an order that the trustee pay it in advance of any dividend to creditors, under sec. 64*a*, as follows:

49	Tax 1902	$5750.00
	Interest to October 15, 1903	891.25
	Costs on injunction proceedings because of non-payments of taxes (begun in August, 1903)	26.15
	Tax 1903	2500.00
	Interest to October 15, 1903	87.50
	Total	$9254.90

Sec. 64*a* reads: "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality, in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court."

A statute of New Jersey, entitled "An act to provide for the imposition of State taxes upon certain corporations and for the collection thereof," which was in force when the bankrupt was incorporated, provided that "all corporations * * * shall make annual return to the State board of assessors on or before the first Tuesday of May in each year, * * * and shall pay an annual license fee or franchise tax of 1/10 of one per centum of all amounts of capital stock issued and outstanding on January 1 of such year up to and including the sum of three million dollars," on any amount in excess of three million, not exceeding five million dollars, 1/20 of one per centum, and on any further excess $50 per million or any part thereof; that the State board shall fix the amount of the "annual license fee or franchise tax," in case the corporation fails to make its return; that on or before the first Monday in June the State board shall report to the comptroller the basis and amount of such tax, which "shall thereupon become due and payable and it shall be the duty of the State treasurer to receive the same;" that "such tax, when determined, shall be a debt due from such company to the State;" that if the tax remains unpaid on July first, it shall thenceforth until paid bear interest at the rate of one per centum a month, and the State thereupon may maintain an action at law for its recovery; that "such tax shall also be a preferred debt in case of insolvency;" that if any tax remains in arrears for three months, the State may apply for an injunction to restrain the company
50 from exercising its franchises; and that if any company is delinquent for two years, its charter shall be void unless further time be given for the payment of such taxes.

New Jersey's constitution requires that "property shall be assessed for taxes under general laws by uniform rules according to its true value."

The referee and the court denied priority, but allowed a reduced amount, $4943.08, as a general claim.

Appellant contends that the court erred in refusing to direct the trustee to pay the claim as taxes, in reducing the amount claimed for 1902, and in rejecting the amount claimed for 1903.

Appellee denies the merits of all of these contentions; but insists that on this appeal the question of priority can not be considered.

BAKER, *Circuit Judge*, delivered the opinion of the court:

I. As more than $500 of appellant's claim was disallowed, an appeal under sec. 25*a* is undoubtedly proper. *In re* Friend, Moss & Morris, — Fed. —. The case being here on appeal respecting the amount of the claim, we think appellant may also present any question concerning the security or rank of the debt, as an incident thereof (Cunningham *v.* German Ins. Co., 103 Fed. 932), though the question of lien or priority, if alone involved, could be reviewed only under sec. 24*b* (*In re* Rouse, Hazard & Co., 91 Fed. 100). If the case of *In re* Worcester County, 102 Fed. 808, is to be construed as requiring us to split the case and dismiss the portion that affects priority, we are not disposed, as now advised, to follow it.

II. Appellant argues that her highest court has decided that the charge is a tax and that the decision is controlling here. The argument is founded on the case of Hancock *v.* Singer Mfg. Co., 62 N. J. L. 289 (decided Nov. 14, 1898). Appellee contends with equal earnestness that the later case of *In re* United States Car Co., 60 N. J. Eq. 514 (decided July 7, 1899), holds that the charge is not a tax. In *In re* Mutual Mercantile Agency, 8 Am. Bankr. R. 435, the referee relied on the Singer Co. case, without noting the car Co. case, and directed the trustee to pay New Jersey a claim like this as taxes under sec. 64*a*. In *In re* Danville Rolling Mill Co., 121 Fed.
51 432, the district court relied on the car Co. case, without noting the Singer Co. case, and refused to order the payment of New Jersey's claim as taxes.

Long before the passage of the act for an "annual license fee or franchise tax," the Singer Co. had been granted by New Jersey a charter which provided that upon certain conditions "the real and personal property of the said corporation not actually and in fact within the State of New Jersey, and the stock of the said corporation held or owned by any of its stockholders, shall not be liable to any tax or impost whatsoever." The State undertook to collect from the Singer Co. an "annual license fee or franchise tax." In Singer Mfg. Co. *v.* Heppenheimer, 58 N. J. L. 634, the attempt was defeated. In the second Singer Co. case, relied on by appellant, the first decision was adhered to. The rationale, it seems to us, is this: The State could collect nothing on account of franchises except (either or both) compensation for granting them or taxes upon their value as property after they had been granted. The consideration for the Singer Co. charter was determined upon when the charter was granted; the contract in that respect could not thereafter be impaired by the State; therefore, if the statute is to be construed as an attempt of the State to exact further compensation for the pre-existing franchises

of the Singer Co., it can not be given effect; the franchises to be and to do, when granted, became property which was subject to be taxed as other property unless the State had lawfully bargained away or limited its right; the State had agreed not to tax the company's property which was outside of the State; it was contemplated in the charter that the company should, and it did in fact, own tangible property and exercise its franchises beyond the State's lines; therefore, if the statute is to be construed as an attempt of the State to tax so much of the franchise values as lie outside of the State, it would be an impairment of the contract. The expressions in the opinion that the "license fee" is a "tax" must be read, we think, in the light of the fact that the court was dealing with a charter with relation to which the statute was subsequent legislation. Carroll *v.* Lessee of Carroll, 16 How. 275, 286.

In the Car Co. case, *supra*, the corporation, to judge from the decision, was organized under the general laws of New Jersey after the statute relating to the so-called "annual license fee or franchise tax" was in force. The corporation was decreed to be insolvent; receivers were appointed; and thereafter the State board of
52 assessors returned to the comptroller an assessment of the "annual license fee or franchise tax." The trial court, interpreting the statutory charge as a tax upon the corporate franchises, and finding that the franchises were valueless and had not been exercised by the receivers, held that the tax was not payable out of the funds in the receivers' hands until after all indebtedness existing at the time of their appointment was discharged. The reviewing tribunal, not denying the justness of the trial court's application of the statute to the facts, if its interpretation of the statute was correct, said: "We cannot concur in this view. Although the statute designates an imposition of this kind as a license fee or franchise tax, it plainly is not a tax upon corporate franchises. In fact it is not, strictly speaking, a tax at all, nor has it the elements of one. It is in reality an arbitrary imposition laid upon the corporation without regard to the value of its property or of its franchises, and without regard to whether it exercises the latter or not, solely as a condition of its continued existence. The State, in creating a corporation, has the right to impose upon its creature such conditions as the legislature, within constitutional limits, may deem proper, and the acceptance by the corporation of the franchises, powers and privileges conferred upon it binds it to the performance of those conditions so long as it continues to remain in possession of those franchises, powers and privileges, and the conditions themselves remain unrevoked by the legislature."

We are of the opinion that the foregoing excerpt is not a mere dictum, but that, on the contrary, it is the court's determination of the essential nature of the statutory imposition, properly given in deciding the question presented. If so, the case may be accepted as controlling, because it is not for the United States bankruptcy courts

to insist upon a State's receiving as a tax under sec. 64*a* something which the State declares is not. *In re* Ott, 95 Fed. 274.

But if we are mistaken, and if the Singer Co. case is to be accepted as an authoritative decision that the charge in question is a tax, we do not believe that the United States bankruptcy courts are bound to follow it blindly. The question with them is the interpretation and application of sec. 64*a*. If the legislature of a State gives the name tax to an exaction which is not a tax, and if the courts of a State join in the misnomer, surely the bankruptcy courts are not required to disregard the substance of the thing, to the detriment of other claimants. The State courts may authoritatively ex-
53 pound the substance and the Federal courts will adopt such exposition; but whether the substance constitutes a tax or not is independent of the name. And moreover the latter part of sec. 64*a* seems to direct the bankruptcy courts to determine independently the "legality of any such tax."

If it be conceded that the word "taxes" in sec. 64*a* includes every contribution to the support of government which any State may exact from the persons, occupations and possessions of its citizens and corporate subjects, is the charge in question a tax? It is not a capitation tax, for it is not laid upon corporations by the head. It is not an occupation tax, for it has no regard to the business in which the corporations engage, It is not a property tax, for it pays no heed to the extent or value of property, as the State constitution requires. Franchises are property. The franchise to be and the franchise to do both go wherever the corporation goes; both are property. Adams Express Co. *v.* Ohio, 166 U. S. 185, 224. A State may grant franchises and then tax them as property, just as it may grant or lease land and then tax the granted estate as property. But the tax upon the estate is not to be confused with the consideration for the grant. If one pays a lump sum or annual sums as the consideration for the grant, he does so by virtue of a contract; but he is not thereby relieved from the sovereign demand, *in invitum*. And that is the distinguishing feature of a tax,—the sovereign does not bargain with his subject, he commands. The statute here under consideration does not purport to be an amendment of the incorporation laws of the State. But when the incorporators of the bankrupt came to seek a charter, this statute expressed one of the terms on which it could be obtained and held. The sovereign State could not command the incorporators to accept a charter; it could only say, if you do accept it, you must pay so and so for the grant.

III. When the bankrupt failed to make its return for 1902, the State board, assuming that the authorized capital stock of $40,000,000 was issued and outstanding on January 1, 1902, fixed the amount of the charge at $5750. The referee and the court reduced this to $4250, the amount properly chargeable to a capital stock of $10,000,000 issued and outstanding. Appellant insists that the action of the State board was quasi judicial and is not subject to collateral attack. This contention would require consideration, if the charge were a

tax. Holding it to be a liability under a contract, we find no error in the court's looking to the contract for the measure of the
54 liability. Whether, as appellee urges, the court erred in allowing any sum whatever for 1902, can not be reviewed, as no cross-appeal was taken.

IV. As to the $2500 item the question is whether it was a debt owing on April 23, 1903, when the petition was filed. The promise of the bankrupt, as we construe it, was to pay on or before the first of July in each year a sum based on the amount of stock issued and outstanding on the first day of January of that year. On January 1, 1902, the amount of stock issued and outstanding was $10,000,000. That determined the amount, even though the stock was reduced to $2,500,000 on May 13, 1902, long before the obligation matured and could be sued upon. Prior to January 1, 1903, the promise to pay on or before July 1, 1903, did not evidence an accrued debt, because it could not be known whether any stock would be outstanding when the first of January should come around. But on that date, we think the promise accrued to pay 1/10 of one per centum on $2,500,000 of stock then outstanding. That the claim bore no interest and could not be sued upon before the first of July, affects only the maturity of the obligation.

The district court is directed to add to its allowance of a general claim the sum of $2500 less a rebate of interest at one per cent. a month from July 1, 1903, back to April 23, 1903. In other respects the decree is affirmed. Costs here to be divided equally.

And afterwards, on the same day, to-wit: on the eleventh day of April, 1905, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, April 11, 1905.

Court met pursuant to adjournment.

Before Hon. James G. Jenkins, Circuit Judge; Hon. Peter S. Grosscup, Circuit Judge; Hon. Francis E. Baker, Circuit Judge.

55 In the Matter of COSMOPOLITAN POWER COMPANY, Bankrupt.

STATE OF NEW JERSEY *vs.* WILLIAM F. ANDERSON, Trustee of the Estate of Cosmopolitan Power Company, Bankrupt.	1122. Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

This cause came on to be heard on the transcript of the record from the district court of the United States for the northern district of Illinois, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged and decreed by this court, that the order or decree of the said district

court entered on September 12, 1904, in this cause, be, and the same is hereby reversed; and that this cause, be, and the same is hereby remanded to the said district court with directions to add to its allowance of a general claim the sum of $2500, less a rebate of interest of one per cent. a month from July 11, 1900, back to April 23, 1903: In other respects the decree is affirmed and it is further ordered that the costs here be divided equally.

56 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 15, inclusive, contain a true copy of the *of the* papers filed (except briefs of counsel) and proceedings had thereon in the United States circuit court of appeals for the seventh circuit in the case of In the matter of Cosmopolitan Power Company, bankrupt, State of New Jersey, vs. William F. Anderson, trustee, of the estate of the Cosmopolitan Power Company, bankrupt, No. 1122, October term, 1904, as the same remains upon the files and records of the United States circuit court of appeals, for the seventh circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this ninth day of April, A. D. 1905.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals
for the Seventh Circuit.

56½ Appeal allowed and bond fixed in the sum of five hundred dollars. In my opinion the determination of the questions involved herein is essential to a uniform construction of the bankruptcy act throughout the United States.

May 11, 1905.

WILLIAM R. DAY,
Associate Justice, Supreme Court of the United States.

57 [Endorsed:] United States circuit court of appeals for the seventh circuit. Filed May 17, 1905. Edward M. Holloway, clerk.

58 And afterwards, to-wit: on the seventeenth day of May, 1905, in the October term last aforesaid, came the appellant, by its counsel, Moran, Mayer and Meyer, and filed in the office of the clerk of this court a notice of motion, which notice is in the words and figures following, to-wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division Thereof, } ss:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1904.

In the Matter of COSMOPOLITAN POWER COMPANY, Bankrupt. No. 1122.

STATE OF NEW JERSEY, Appellant,
vs.
WILLIAM F. ANDERSON, Trustee, etc., Appellee.

To Messrs. Wheeler, Silber & Isaacs, attorneys for appellee:

Please take notice that on Wednesday, the 17th day of May, A. D. 1905, at the opening of the court at 2 o'clock p. m. before the United States circuit court of appeals for the seventh circuit, in the court-room usually occupied by them, we shall ask leave to file the certificate of William R. Day, associate justice of the Supreme Court of the United States, granting an appeal in the above entitled cause
59 to the Supreme Court of the United States, from the order of the United States circuit court of appeals for the seventh circuit, and at the same time we shall file an appeal bond therein, at which time and place you may appear if you see fit.

MORAN, MAYER & MEYER,
Attorneys for Appellant.

LEVY MAYER, Of Counsel.

Received copy of the above and foregoing notice this 16th day of May, 1905.

WHEELER, SILBER & ISAACS.

Endorsed: Filed May 17, 1905. Edward M. Holloway, clerk.

And afterwards, on the same day, to-wit: on the seventeenth day of May, 1905, in the October term last aforesaid the following further proceedings were had and entered of record to-wit:

WEDNESDAY, May 17, 1905.

Court met pursuant to adjournment.

Present: Hon. Peter S. Grosscup, circuit judge presiding. Hon. Francis E. Baker, circuit judge. Hon. William H. Seaman, circuit judge.

In the Matter of COSMOPOLITAN POWER COMPANY, Bankrupt.

STATE OF NEW JERSEY vs. WILLIAM F. ANDERSON, Trustee, etc. } 1122. Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

60 Now this day comes the appellant by its counsel Mr. Levy Mayer, and presents the order of the Supreme Court of the United States, entered on the eleventh day of May, 1905, allowing an appeal in this court, bond for costs and citation; thereupon it is ordered by the court that the same be filed and that mandate in this cause be stayed until further order of this court.

And afterwards, on the same day, to-wit: on the seventeenth day of May, 1905, in the October term last aforesaid, there was filed in the office of the clerk of this court the bond on appeal, which bond is in the words and figures following, to-wit:

Know all men by these presents, that we, State of New Jersey, as principal, and American Bonding Company of Baltimore, as sureties are held and firmly bound unto William F. Anderson, trustee of Cosmopolitan Power Company in the full and just sum of five hundred dollars to be paid to the said William F. Anderson trustee of Cosmopolitan Power Company, certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eleventh day of May, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a term of the United States circuit court of appeals for the seventh circuit in a suit depending in said court between State of New Jersey, appellant and William F. Anderson, trustee of Cosmopolitan Power Company, appellee, a decree
61 was rendered against the said State of New Jersey, and said State of New Jersey having obtained an order allowing an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said William F. Anderson, trustee of Cosmopolitan Power Company, citing and admonishing him to be and appear at a Supreme Court of the United States at Washington, within 30 days from the date thereof.

Now the condition of the above obligation is such, that if the said State of New Jersey shall prosecute her appeal to effect, and answer all damages and costs, if she fail to make her plea good,

then the above obligation to be void; else to remain in full force and virtue.

STATE OF NEW JERSEY, [SEAL.]
By THOMAS A. MORAN, Attorney. [SEAL.]
AMERICAN BONDING COMPANY OF BALTIMORE,
By THOS. J. DE LASHMUTT, [SEAL.]
Attorney in Fact.

Sealed and delivered in presence of—
J. M. RYAN.
F. D. MITCHELL.

Approved by—
WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

Endorsed: Filed May 17, 1905. Edward M. Holloway, clerk.

And afterwards, on the same day, to-wit: on the seventeenth day of May, 1905, in the October term last aforesaid, there was filed in the office of the clerk of this court an assignment of errors, which assignment of errors, is in the words and figures following, to-wit:

62 In the Supreme Court of the United States, October Term, A. D. 1904.

In the Matter of COSMOPOLITAN POWER COMPANY, Bankrupt.

STATE OF NEW JERSEY, Appellant,
vs.
WILLIAM F. ANDERSON, Trustee of the Estate of Cosmopolitan Power Company, Bankrupt.

Assignment of Errors.

And now comes the State of New Jersey and files herein the following assignments of error upon which it will rely upon its appeal from the judgment of the United States circuit court of appeals for the seventh circuit, in the above entitled cause, being a certain judgment entered therein on April 11, 1905, on the claim of the State of New Jersey which judgment denied to said claimant priority under section 64*a* of the bankruptcy act.

The appellant assigns as error the following:

1. For that the said United States circuit court of appeals for the seventh circuit erred in holding that the franchise tax, upon which the said claim was based, was not such a claim as was entitled to priority under section 64*a* of the bankruptcy act of 1898.

2. For that said United States circuit court of appeals for the seventh circuit, erred in holding that the said license fee or franchise tax was not a tax.

3. For that the said United States circuit court of appeals for the seventh circuit erred in allowing the claim of the State of
63 New Jersey as a general claim and not as a preferred claim.

4. For that the said United — circuit court of appeals for the seventh circuit erred in not allowing the claim of the State of New Jersey as a preferred claim for the sum of $9,254.90.

5. For that the United States circuit court of appeals for the seventh circuit erred in holding that the franchise tax assessed against the said Cosmopolitan Power Company, bankrupt, for the year 1902, amounting to $5,750.00 and the interest thereon was not such a claim as was entitled to priority under section 64*a* of the bankruptcy act of 1898.

6. For that the United States circuit court of appeals for the seventh circuit, erred in holding that the franchise tax assessed against the said Cosmopolitan Power Company, bankrupt, for the year 1903, amounting to $2,500.00 and the interest thereon, was not such a claim as was entitled to priority under section 64*a* of the bankruptcy act of 1898.

7. For that the said United States circuit court of appeals for the seventh circuit erred in allowing the said claim of the State of New Jersey for the franchise tax of 1902 for the sum of $4,250.00 and not for the sum of $5,750, as filed.

Wherefore in order that the foregoing assignment of errors may be and appear of record the said State of New Jersey presents the same to the court and prays that such disposition be made thereof as in accordance with law and the statutes of the United States in such cases made and provided, and the said State of New Jersey prays that said judgment of said United States circuit court
64 of appeals, for the seventh circuit, may be reversed and the said cause remanded to the said district court with directions to enter an order allowing the entire claim of said State of New Jersey as a preferred claim under section 64*a* of the bankruptcy act and amendments thereto.

LEVY MAYER,
ROBERT H. McCARTER,
T. A. MORAN,
Attorneys for said State of New Jersey.

Endorsed: Filed May 17, 1905. Edward M. Holloway, clerk.

And afterwards, on the same day, to-wit: on the seventeent- day of May, 1905, there was filed in the office of the clerk of this court a citation, which citation is in the words and figures following, to-wit:

65 UNITED STATES OF AMERICA, ss:

To William F. Anderson, trustee of Cosmopolitan Power Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the United States circuit court of appeals for the seventh circuit wherein The State of New Jersey is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William R. Day, associate justice of the Supreme Court of the United States, this 11th day of May, in the year of our Lord one thousand nine hundred and five.

WILLIAM R. DAY,
Associate Justice of the Supreme Court
of the United States.

66 We hereby accept service of the within citation.

WHEELER, SILBER & ISAACS,
Attorneys for William F. Anderson, Trustee.

Chicago May 17/05.

Filed May 17 1905.
EDWARD M. HOLLOWAY, Clerk.

67 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing typewritten pages, numbered from 17 to 24, inclusive, contain a true copy of the papers filed and proceedings had thereon in the United States circuit court of appeals for the seventh circuit, subsequent to the foregoing certificate of April 9, 1905, in the case of In the matter of Cosmopolitan Power Company, bankrupt, State of New Jersey, *vs.* William F. Anderson, trustee of the estate of Cosmopolitan Power Company, bankrupt, No. 1122, October term, 1904, as the same remains upon the files and records of the United States circuit court of appeals, for the seventh circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh

circuit, at the city of Chicago, this twenty-second day of May A. D. 1905.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.

Endorsed on cover: File No. 19,804. U. S. circuit court of appeals, 7th circuit. Term No. 302. The State of New Jersey, appellant, *vs.* William F. Anderson, trustee of Cosmopolitan Power Company. Filed June 15th, 1905. File No. 19,804.

FILE COPY.

Office Supreme Court U. S.
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NOV 13 1905
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

No. [redacted] 49

In Re COSMOPOLITAN POWER COMPANY, Bankrupt,
THE STATE OF NEW JERSEY, *Appellant,*
vs.
WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

SUGGESTIONS OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS THE APPEAL.

LEVY MAYER,
ROBERT H. McCARTER,
Attorneys for State of New Jersey, Appellant.

THE GUNTHORP-WARREN PRINTING CO., 116 RANDOLPH STREET, CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

No. 302.

In Re COSMOPOLITAN POWER COMPANY, Bankrupt,

THE STATE OF NEW JERSEY, *Appellant*,

vs.

WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt, *Appellee*.

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

SUGGESTIONS OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS THE APPEAL.

STATEMENT.

I.

The appeal in this case was taken under section 25, clause 2 of the Bankruptcy Act, which provides *inter alia* that an appeal may be had from any final decision of a court of appeals allowing or rejecting a claim,

> "Where some Justice of the Supreme Court of the United States shall *certify* that *in his opinion* the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

The questions here in controversy relate solely to the construction of that part of section 25 above quoted, as it is not disputed that the decision of the Court of Appeals for the Seventh Circuit in this case complies in other respects with the requirements of section 25.

On May 11, 1905, Mr. Justice Day allowed the appeal of appellant, under the provisions of section 25 above quoted, and certified of record that

> "*In my* (*his*) *opinion* the determination of the questions involved herein is essential to a uniform construction of the bankruptcy act throughout the United States." (Rec., 56½.)*

Opposing counsel, however, takes issue with the learned justice who allowed the appeal and argues in support of the motion to dismiss that this court is without jurisdiction because

> "the question involved is *not essential* to a uniform construction of the bankruptcy act throughout the United States." (Brief, p. 5.)

Section 25 of the Bankruptcy Act unconditionally provides that an appeal may be had where some justice shall certify that "*in his opinion*" (not in the opinion of the whole court) the determination of the questions involved is essential to a uniform construction of the Bankruptcy Act. The manifest purpose of that section is that the appeal should be allowed upon obtaining the requisite certificate "of some justice of the Supreme Court."

The only other conditions are (1) that the judgment of the Court of Appeals must be final, and (2) the decision must be one "allowing or rejecting a claim." Both of these conditions exist in the case at bar, and

*Note. References are to folio pages of record.

the granting of the certificate is therefore conclusive. Congress never intended that the "opinion" of the justice allowing the appeal should be revised or reviewed. The act does not say that an appeal shall be allowed *where the questions involved are essential to a uniform construction of the act.* It says that it shall be allowed "Where some justice * * * *shall certify that in his opinion* the determination of the question * * * is essential to a uniform construction." If Congress had intended to make the granting of an appeal *conditional* upon the *fact* that the determination of the question was *essential to a uniform construction of the act* and not upon *the obtaining of the certificate of opinion* to that effect, it would have so expressed it. The jurisdictional fact is the obtaining of the certificate of opinion. In the present case the learned justice has judicially determined (Rec., 56½) that *in his opinion* the determination of the questions involved is essential to a uniform construction of the act. Will the court revise that judgment and say that such was not the opinion of the learned justice or that such opinion is erroneous? There is nothing in the Bankruptcy Act to justify it.

In *Callan* v. *May,* 2 Black, 541, relied on by appellee (as holding that the allocatur of a single justice allowing an appeal, is not conclusive), an interlocutory order was issued in certain proceedings pending in a Circuit Court, awarding a writ of *habere facias possessionem* against one Callan (the appellant). Callan petitioned for an appeal to this court and the appeal was allowed on special allocatur by Mr. Justice Wayne. A motion was made to dismiss the appeal on the ground that the

order appealed from was not a final order. This court said (p. 543):

> "The order of the court directing process to issue is not such a final order or decree in a case as the act of 1789 contemplates."

It was in this connection that the court held that the order of Mr. Justice Wayne allowing the appeal was not conclusive, and said (p. 543):

> "Writs of error to state courts cannot issue without the allocatur of a judge of this court. Yet there is hardly a term in which a case of that description has not been dismissed upon the ground that the transcript did not show a case in which a writ of error would lie."

And again (p. 544):

> "The allocatur of a single judge certainly cannot enlarge the appellate powers of this court beyond the limits prescribed by law, and that law does not authorize an appeal from an order directing execution to issue to enforce a judgment."

The Act of 1789, under which the above decision was rendered, provides that certain designated classes of cases may be re-examined and reversed or affirmed in this court upon a writ of error. Section 25 of the Act of 1789 is construed in *Twitchell* v. *Commonwealth*, 7 Wall., 321, where this court said (p. 324):

> "But writs of error to state courts have never been allowed as of right. It has always been the practice to submit the record of the state courts *to a judge of this court*, whose duty has been to ascertain upon examination *whether any question, cognizable here upon appeal*, was made and decided in the proper court of the state, and whether the case upon the face of the record will justify the allowance of the writ.
>
> In general, the allowance will be made where the decision *appears* to have involved a question with-

> in our appellate jurisdiction; but refusal to allow the writ is the proper course when no such question appears to have been made or decided; and also where, although a claim of right under the Constitution or laws of the United States may have been made, it is nevertheless clear that the application for the writ is made under manifest misapprehension as to the jurisdiction of this court."

It is not disputed if a justice of this court allows a writ of error or an appeal in a case of which this court has no jurisdiction under the Judiciary Act, that the order of the justice is not conclusive upon the whole court. In *Callan* v. *May* the appeal was dismissed because the order appealed from was not final. It is clear that the allocatur of the justice in that case could not operate to confer upon the court jurisdiction of a matter without its jurisdiction. In the present case the certificate of Mr. Justice Day *did* confer jurisdiction of the cause when he certified that *in his opinion*

> "the determination of the questions involved herein *is essential* to a uniform construction of the Bankruptcy Act."

The certificate of the justice in the present case is *jurisdictional*, and operated to confer jurisdiction upon this court under the express terms of Section 25 of the Bankruptcy Law, which provides that

> "an appeal may be had * * * where some justice shall certify that *in his opinion* the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction"

of the Bankruptcy Act, etc.

A reading of *Callan* v. *May* demonstrates its inapplicability. Thus it is stated that an *allocatur* of a single

justice is not binding upon the whole court for the reason that to so hold

> "would throw upon a single judge the responsibility which properly belongs to the court."

This reasoning does not apply here, because Section 25 *does* throw the responsibility upon a single justice, by providing for the allowance of an appeal upon a certificate by such justice that "in *his* opinion," etc. Again it is said in the Callan case:

> "It does not by any means follow that the judge who authorizes the appeal has made up his own mind that the party is legally entitled to it."

This reasoning clearly differentiates the case from the one at bar for here the fact that the justice must certify "*his* opinion" certainly presupposes that the justice has made up his mind.

And in the concluding sentence of the opinion the court said:

> "The *allocatur* of a single judge certainly can not enlarge the appellate powers of this court beyond the limits prescribed by law, *and that law does not authorize an appeal* from an order directing execution to issue to enforce a judgment" (*i. e.*, the order was not of a final nature).

In the present case the certificate of the justice *confers the jurisdiction.* In *Callan* v. *May* the order could not have that effect, for the reason that the appeal was not one authorized by law and of course the order could not confer jurisdiction over an unauthorized appeal. In that case the granting of the *allocatur* was purely a matter of procedure; here it is jurisdictional.

II.

THE DETERMINATION OF THE QUESTIONS INVOLVED IS ESSENTIAL TO A UNIFORM CONSTRUCTION OF THE BANKRUPTCY ACT.

But, even if it were to be conceded that the certificate of Mr. Justice Day is not conclusive upon this court, the record amply demonstrates that the determination of the questions here involved is essential to a uniform construction of the Bankruptcy Act. Although this is not the occasion to discuss the merits of the case, it is necessary to briefly refer to the facts and to a few of the decisions upon the questions of law arising on this record, in order to show the logic of the opinion of Mr. Justice Day that the determination of the questions here involved *is* essential to a uniform construction of the Act.

The Cosmopolitan Power Company (the bankrupt) is a corporation organized under the laws of the State of New Jersey on April 30, 1900. Its capital stock on January 1, 1902, was $40,000,000, of which $10,000,000 was issued and outstanding. On May 13, 1902, its capital stock was reduced to $2,500,000. No franchise taxes have been paid to the State of New Jersey for the years 1902 and 1903. A petition in bankruptcy was filed against the Cosmopolitan Power Company on April 23, 1903, and the company was thereafter duly adjudicated a bankrupt. On November 7, 1902, the State Board of Assessors of New Jersey upon the failure of the Cosmopolitan Company to make a return, levied an assessment for a license tax against the com-

pany, for the year 1902, of $5,750. (Rec., 17.) On June 1, 1903, there was assessed against the company for the year beginning January 1, 1903, a similar tax of $2,500 (Rec., 30), in accordance with the return of the company, which return was filed on May 2, 1903. (Rec., 27-29.)

On February 12, 1904, a motion was made for an order on the trustee to pay the claim as a preferred claim in advance of the payment of dividends to the creditors of said estate. (Rec., 27.)

Objections were filed to the claim by the trustee (Rec., 2) on the ground that the claim was not entitled to priority; also that it was not properly provable against the estate. The referee allowed the claim as a general claim for the sum of $4,943.08. (Rec., 10.)

The referee in denying the claim held (Rec., 9) that the kind of tax contemplated by the Bankruptcy Act is one that is a lien on the property out of which the collection is made. The referee also held (Rec., 8) that a franchise tax was not a tax but a mere contract obligation. Thereafter appellant filed its petition for review (Rec., 12), and on September 12, 1904, the District Court affirmed the order of the referee without an opinion (Rec., 32).

An appeal was prosecuted to the United States Circuit Court of Appeals for the Seventh Circuit. That court allowed the claim of $2,500 for the 1903 taxes as a general claim, but in other respects affirmed the judgment of the District Court and denied priority to any part of the claim of appellant. (Rec., 48-54; 137 Fed., 862.)

The claim of the State of New Jersey was made up of the following items (Rec., 16):

Tax 1902	$5,750.00
Interest to October 15, 1903	891.25
Costs on injunction proceedings, because of non-payment of taxes	26.15
Tax 1903	2,500.00
Interest to October 15, 1903	87.50
	$9,254.90

The taxes in question were assessed under the Act of April 18, 1884 (Laws of New Jersey of 1884, Chap. 159), as amended. The Act is entitled "An Act to provide for the imposition of *state taxes* upon certain corporations and for the collection thereof." Section 1 provides that

> "All corporations * * * shall pay an annual license fee or franchise tax of one-tenth of one per centum on all amounts of capital stock *issued and outstanding* up to and including the sum of $3,000,000."

The same section further provides for the making of a return on or before the first Tuesday of May in each year of the amount of stock outstanding on the preceding January first.

Section 2 provides that on failure of the corporation to make a return, the State Board of Assessors, shall fix the "annual license fee or franchise tax" and the amount so fixed "*shall stand as the basis of taxation*" under the act.

Section 3 provides that the State Board of Assessors shall report to the Comptroller on or before the first Monday of June in each year, a statement of the basis of "the annual license fee or franchise tax" and the

"amount of tax" due, which tax shall thereupon be due and payable, and that if the tax remains unpaid on July 1st, interest shall be charged.

Section 4 provides:

> "Such tax, when determined shall be a debt due from such company to the state, for which an action at law may be maintained after the same shall have been in arrears for the period of one month; *such tax shall also be a preferred debt in case of insolvency.*"

Section 5 provides that in addition to other remedies for the collection of such tax, it shall be lawful whenever any tax shall remain in arrears for three months, to apply for an injunction to restrain the corporation from the exercise of any franchise or the transaction of any business until the payment of such tax.

Section 6 provides that if any corporation shall for two consecutive years fail to pay any tax which shall be assessed against it, the charter shall be void unless further time is given for the payment of such taxes.

Section 7 provides for making a list of delinquent corporations which fail to pay taxes.

Section 10 provides for the appointment of a receiver to enforce the collection of taxes.

It is under this act that the taxes upon which the claim of the appellant is based, were levied. Wherever the charge is spoken of in the statute it is referred to as a tax. In numerous decisions under this act, the nature of this tax has been discussed and its character as a tax has been established.

It was contended in the Circuit Court of Appeals

that the franchise tax imposed by the State of New Jersey was a tax within the meaning of Section 64, Subd. A, of the Bankruptcy Act, and that inasmuch as the highest court of New Jersey in *Hancock, Comptroller,* v. *Singer Mfg. Co.,* 62 N. J. L., 289 (decided Nov. 14, 1898), had squarely so decided, the Federal Court was bound thereby. The question in that case was whether the levying of a franchise tax upon the capital stock of a corporation was a violation of a tax exemption clause in the company's charter. The court there said:

> "The Act of 1884 (Pamph. L, p. 232) is entitled 'An Act to provide for the imposition of state taxes upon certain corporations and for the collection thereof.'
>
> 'In this act this imposition is called a yearly license fee or tax.'
>
> In a supplement passed to the Act of 1884 (Pamph. L, 1891, p. 150), it is styled 'a tax.'
>
> In a further supplement passed in 1892 (Pamph. L, p. 136) it is called 'an annual license fee or franchise tax.'
>
> It is wholly immaterial what name may be given to it. The fact that it is called a 'license fee' or 'franchise tax' cannot validate it. It is levied under an act passed 'to authorize the imposition of state taxes,' and it is none the less an interdicted imposition, and *none the less a tax because it is given a new name.*"

And so it was also held in the following cases in the courts of New Jersey, to which it is not necessary to further refer at the present time:

State v. *Evening Journal Ass'n,* 47 N. J. L., 36;

State Board of Assessors v. *Central R. R. Co.,* 48 N. J. L., 146;

Standard Cable Co. v. *Attorney General*, 46 N. J. Eq., 270;
Pipe Line Co. v. *Berry*, 52 N. J. L., 308, 311;
Trenton Savings Fund v. *Richards*, 52 N. J. L., 156;
Honduras Commercial Co. v. *State Board of Assessors*, 54 N. J. L., 278;
Lumberville Bridge Co. v. *Assessors*, 55 N. J. L., 529;
State v. *Board of Assessors*, 61 N. J. L., 461;
Myers v. *Campbell*, 64 N. J. L., 186;
Ches. & O. Ry. Co. v. *Atlantic Transp. Co.*, 62 N. J. Eq., 751;
Mayor, etc., of Newark, v. *State Board*, 67 N. J. L., 246;
Arimex Cons. Copper Co. v. *State Board*, 69 N. J. L., 121;
Hardin v. *Morgan*, 70 N. J. L., 484.

The Circuit Court of Appeals held in effect (Rec., 52) that the decisions of the New Jersey courts holding the imposition was a tax, were not binding on it and that the court could determine the question irrespective thereof. Referring to the Singer case the Circuit Court of Appeals said,

> "we do not believe that the United States bankruptcy courts are bound to follow it blindly,"

though in the following cases it was held that the bankruptcy courts should follow state decisions upon the question as to whether or not a particular imposition was a tax:

In Matter of Emmerman v. *Ohio Steel & Iron Co.*, 13 Am. Bank R., 40 (Dist. Ct. N. Dist. of Ohio E. D.);

In re Ott, 2 Am. B. R., 637, 647 (Dist. Ct. So. Dist. of Iowa); s. c., 95 Fed., 274;

Matter of Mutual Merc. Agency, 8 Am. B. R., 435 (Dist. Ct. So. Dist. of N. Y.);

In re Danville Rolling Mill Co., 10 Am. B. R., 327 (Dist. Ct. E. Dist. of Pa.); s. c., 121 Fed., 432.

In the case of *Mutual Mercantile Agency*, 8 Am. Bank. Rep., p. 435, decided by the District Court of the Southern District of New York (September 3, 1902), it was held that a franchise tax levied by the State of New Jersey under the same Act of April 18, 1884 was a tax within the meaning of Section 64a of the Bankruptcy Law *and entitled to priority*. It was there said:

> "This case (*Hancock, Comptroller*, v. *Singer Mfg. Co., supra*) is controlling. To hold otherwise would be to deny the State of New Jersey a priority under the above mentioned section, as all of the revenue of the state is raised by franchise tax except a small school tax.
>
> *There is nothing in the Bankruptcy Act to suggest an intention of Congress in the use of the word 'tax' to limit the meaning to any particular kind of tax.*
>
> Therefore an order may be entered allowing the aforesaid claim of the State of New Jersey as a priority claim and directing the trustee to pay the same."

The holding of the Singer case would seem conclusive that the franchise tax here in controversy is a tax, but it is unnecessary at this time to review that case at length.

The same conclusion was reached in *1st Nat. Bank* v. *Aultman, Miller & Co.* (decided June 13, 1904), 12

Am. Bank. Rep., p. 12 (Northern District of Ohio). The referee there held that a franchise tax levied by the State of Ohio upon the capital stock of one of its corporations, was a provable claim in bankruptcy and entitled to priority.

A similar conclusion was reached by Referee Doyle in *Matter of Emmerman* v. *Ohio Steel & Iron Co.* (Dist. Court N. Dist. of Ohio E. D.), 13 Am. B. R., p. 40, decided June, 1904, which decision was affirmed by Judge Wing on January 9, 1905.

The opposite conclusion was reached upon precisely the same state of facts in *In re Danville Rolling Mill Co.*, 121 Fed., 432, s. c., 10 Am. B. R., 327, decided by Judge McPherson, of the Eastern District of Pennsylvania, April 3, 1903. That case without any reference to *Hancock, Comptroller*, v. *Singer Mfg. Co.*, relied on the supposed authority of *In re United States Car Co.*, 60 N. J. Eq., 514, decided July 7, 1899, less than eight months later than the Singer case was decided. The facts in that case were as follows: The State of New Jersey assessed a state tax against the car company, under the Act of 1884, subsequent to the entry of a decree of insolvency and the appointment of receivers. The receivers did not have sufficient assets to pay the debts of the company; nor was the business of the company continued in any way, nor its franchises exercised, after the appointment of the receivers.

As we contended in the Circuit Court of Appeals, it was not necessary for the court in the Car Company case to decide whether or not the imposition in question was or was not a tax, as the only issue was whether

the charge was payable if it was imposed after the appointment of a receiver. The New Jersey court decided that payment must be made, because of the provision of the New Jersey Act (Section 6) that

> "such tax shall be a *preferred* debt in case of insolvency."

When this case is heard on its merits we think that it will be readily shown that there is no conflict between the Singer case (62 N. J. L., 289) and the Car Company case (60 N. J. E., 514). It is not disputed that the Singer case holds the franchise tax *is a tax*. It is contended that the Car Company case holds the contrary. A reading of that case indicates that the language relied on is mere *dicta*. The fact that the Car Company case was decided less than eight months after the decision in the Singer case, and without any reference to it, proves that it was not meant to overrule the Singer case, and the fact that of the *nine* judges who decided the Car Company case *seven* concurred in the two opinions in the Singer case (58 N. J. L., 633, and 62 N. J. L., 289), makes this contention still more conclusive. The Circuit Court of Appeals, however, held that it was not bound to follow the decision in the Singer case. (Rec., 52, 53.)

But even if the New Jersey cases were to be disregarded the decisions of this court should be binding.

In *W. U. Tel. Co.* v. *Massachusetts*, 125 U. S., 530, this court, in speaking of a charge of this character, said:

> "But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation."

And in *Massachusetts* v. *W. U. Tel. Co.*, 141 U. S., 40, 45:

> "By whatever name the tax may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation; and those laws attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein."

And to the same effect are:

Wilmington R. R. Co. v. *Reid*, 13 Wall., 264;

A. & P. Tel. Co. v. *Philadelphia*, 190 U. S., 160;

W. U. Tel. Co. v. *Missouri*, 190 U. S., 412;

I. C. R. R. Co. v. *Decatur*, 147 U. S., 190.

It is contended by appellee that there is absolute uniformity of decision in the holdings of the various courts in deciding the questions here in controversy. Let us see!

Section 64, subdivision A of the Bankruptcy Act, provides:

> "The court shall order the trustee to pay *all taxes* legally due and owing by the bankrupt to the United States, *state*, county, district or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of such tax the same shall be heard and determined by the court."

In the matter of the *Mutual Mercantile Agency*, *supra*, Referee Allen, on the authority of *Hancock* v.

Singer Mfg. Co., 62 N. J. L., 289, sustained the preferential character of the franchise tax of New Jersey here in controversy and construed Section 64, Subdivision A, *supra*, and said:

> "Following the principle of the Ott case that the construction given by the state court to the state exemption laws should be followed by the Federal Courts, we must consult the law * * * of the State of New Jersey in deciding the case under discussion."

And the referee further held:

> "In the case of *Hancock, Comptroller*, v. *Singer Mfg. Co.*, reported in 62 N. J. L., 289, the highest court of the State of New Jersey *has in no uncertain way* decided that the franchise tax was a tax,"

and the referee following the decisions of this court in

> *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S., 530, 547, and
>
> *Ill. Cent. R. R. Co.* v. *Decatur*, 147 U. S., 190-199,

said:

> "Such exactions have always been held to be taxes *by whatever name they happen to be called.*"

And the referee concluded:

> "There is nothing in the Bankruptcy Act to suggest an intention of Congress, in the use of the word 'tax,' *to limit the meaning to any particular kind of tax.*"

The opinion of Referee Allen was affirmed by the District Court. (Rec., 5.)

Yet in the present case the Circuit Court of Appeals when *Hancock* v. *Singer Mfg. Co.* was pressed upon its attention as a controlling authority, said:

> "But if we are mistaken, and if the Singer Co.

> case is to be accepted as an authoritative decision that the charge in question is a tax, *we do not believe that the United States Bankruptcy Courts are bound to follow it blindly.* THE QUESTION WITH THEM IS THE INTERPRETATION AND APPLICATION of Section 64a. If the legislature of a state gives the name tax to an exaction which is not a tax, and if the courts of a state join in the misnomer, surely the bankruptcy courts are not required to disregard the substance of the thing, to the detriment of other claimants. The state courts may authoritatively expound the substance and the Federal courts will adopt such exposition; but whether the substance constitutes a tax or not is independent of the name. And moreover, the latter part of Section 64a seems to direct the bankruptcy courts so determine independently the 'legality of any such tax.'"

We thus have a clear and irreconcilable conflict between two courts on at least one question which relates to the construction of the act, viz., whether the bankruptcy courts are bound to follow the highest court of the state, as held in the Mutual Mercantile Agency case, *supra*, and other cases, *infra*, or whether such courts can decide the question without reference to state decisions, as held by the Circuit Court of Appeals in the present case.

And *In re Ott*, 2 A. B. R., 637 (Dist. Ct. So. Dist. of Ia., East Div.), s. c., 95 Fed., 274, Judge Woolson, in a lengthy opinion, holds that the decisions of the highest courts of the state, as to whether or not a particular charge is a tax, are binding on the Federal courts sitting in bankruptcy, saying:

> "I am convinced that this court must follow the state court on this matter."

And in the matter of *Emmerman* v. *Ohio Steel &*

Iron Co., 13 Am. B. R., 40 (Dist. Ct. No. Dist. of Ohio, E. D.), Referee Doyle said:

> "In determining what is a tax in the respective states, the bankruptcy courts look to the laws and decisions of such states."

Again, the Circuit Court of Appeals, in construing the nature of the present franchise tax, holds that it is neither a capitation tax nor an occupation tax, nor a property tax. And says (Rec., 53):

> "A state may grant franchises and then tax them as property, just as it may grant or lease land and then tax the granted estate as property. But the tax upon the estate is not to be confused with the consideration for the grant. If one pays a lump sum or annual sums as the consideration for the grant, *he does so by virtue of a contract.* * * * *Holding it to be a liability under a contract*, we find no error in the courts looking to the contract for the measure of the liability."

Yet in *In re Danville Rolling Mill Co.*, 121 Fed., 432, s. c., 10 Am. B. R., 327 (Dist Ct. of Penn., East Div.), when the argument was made that this very franchise tax was provable as a "contractual obligation," Judge McPherson replied:

> "This argument is ingenious, but I do not regard it as sound. * * * Certainly, the ordinary meaning of the phrase, 'a contract, express or implied,' does not include the public duties that a corporate creature owes to its sovereign creator. If it includes the duty to pay lawful annual charges, it also includes the duty to obey all other laws; and since 'debt,' in the Bankruptcy Act, means 'any debt, demand or claim provable in bankruptcy,' it would follow logically that any money claim of the state against a corporation, arising out of a violation of law, would be also provable. It seems to me impossible to stretch the language of this

clause so far as to include the subject now under consideration."

There is here, then, without any reference to state decisions, another clear and irreconcilable conflict between two courts as to the nature of the tax.

And in this connection it may not be out of place to call attention to the holding of the referee in the present case when he stated (Rec., 9):

> "It seems to me that the kind of tax contemplated by the bankruptcy statute is one that *is a lien on the property* out of which the collection is to be made."

In marked contrast to this holding is the decision in the Mutual Mercantile Agency case, *supra*, wherein it is stated that:

> "There is nothing in the Bankruptcy Act to suggest an intention of Congress in the use of the word 'tax,' to limit the meaning to any particular kind of tax."

To reconcile all of the cases with reference to the scope of Section 64a, or the nature of franchise taxes in general would be a manifest impossibility.

There is also another important question relating to the construction of Section 64a the decision of which is necessary to the disposition of this case. The last clause of that section provides:

> "In case any question arises as to the amount or *legality* of any such tax, the same shall be heard and determined by the court."

Appellant's claim for the 1902 taxes was for $5,750. The referee under the authority of that portion of Section 64a above quoted, *revised* the assessment of the board of assessors of New Jersey, and allowed the claim for $4,250. In 1902 the

corporation failed to make a return and the board of assessors under the provisions of the act (Sec. 2) fixed the tax at $5,750 on the amount of the *authorized* capital stock ($40,000,000). As a matter of fact, but $10,000,000 of the stock was issued and outstanding, and if the corporation had made a return the tax would have been but $4,250.

The act provides (Sec. 2) that on failure of the corporation to make a return as required by section one of the act the State Board of Assessors shall fix "the annual license fee or franchise tax" and

> "The amount so fixed by them (assessors) shall stand as such basis of taxation under the act."

It is clear that the fact that the assessors based their assessment on the *authorized* capital stock instead of upon the *issued* capital stock, is chargeable solely to the failure of the corporation to make a report, as required by law. In the absence of such a report, the board of assessors made their assessment according to law. The authorities are unanimous that in this collateral proceeding the assessment in question cannot be assailed. It is binding on all the world unless impeached in a direct proceeding. The statutes expressly provide a means for the adjustment of unjust taxes (Laws of New Jersey of 1897, p. 178; also Dill's Corporation Laws of N. J., Ed. of 1903, p. 161).

Yet the court affirmed the action of the referee (Rec., 53, 54) and held that as the liability was one under a contract there was no error in the courts looking to the contract for the measure of the liability. The Circuit Court of Appeals says (Rec., 53):

> "This contention would require consideration, if the charge were a tax. Holding it to be a lia-

> bility *under a contract*, we find no error in the courts looking to the contract for the measure of the liability."

Although, as stated, we have not attempted to here argue the merits of the case, we wish to suggest that to range the present franchise tax in the class of contract liabilities would be to deny to the New Jersey legislature the power to increase or decrease this annual franchise tax. We do not believe a court would deny to the sovereign State of New Jersey any such power.

The Circuit Court of Appeals says (Rec., 52):

> "Moreover the latter part of Sec. 64a seems to direct the bankruptcy courts to determine independently the 'legality of any such tax.'"

It was attempted there to justify the action of the referee in revising the 1902 tax by reference to the provision of Section 64a above quoted.

It was argued by the appellant in the Circuit Court of Appeals that Sec. 64a did not justify the action of the referee, and that the assessment in question was not subject to collateral attack. We will not now discuss the merits of that question, except to state that it is one of the questions which needs to be decided by this court. It is not unusual for a corporation in a failing condition to neglect to make a return to the taxing authorities as to its outstanding capital stock, preceding the bankruptcy proceedings, as was done by the corporation in the present case. The question here presented is likely to frequently arise and the determination of the question by this court is essential to a uniform construction of the Act, especially in view of the holding of the Circuit Court of Appeals that the referee

can review the assessment, which is without support in the authorities. Even if it were conceded that the tax was *erroneously* assessed, this would be far from involving the "*legality*" of the tax.

In conclusion we submit that the motion to dismiss the appeal should be denied. We believe that it was the clear and expressed intention of Congress to make the granting of the certificate of opinion by a justice of this court final, and the issuing of the certificate in the present case is therefore jurisdictional, and not a mere matter of procedure. If our contention is not correct we believe that the record amply justifies the action of the learned justice in allowing the appeal. There exist in many of the states laws similar to the present franchise tax law of New Jersey. Many corporations have been adjudicated bankrupt under the present law and in many of the cases (and there are several pending in the District Court for the Northern District of Illinois) the question is, and has been, presented as to the right of a state to priority in the payment of accrued and accruing franchise taxes. It is therefore of great importance that uniformity should prevail, and that the proper rule of law should be finally and permanently established by this tribunal. We respectfully submit that the motion to dismiss the appeal should be denied.

LEVY MAYER,
ROBERT H. MCCARTER,
Attorneys for State of New Jersey, Appellant.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

In the matter of COSMOPOLITAN POWER COMPANY, Bankrupt,

STATE OF NEW JERSEY,
Appellant,

vs.

WILLIAM F. ANDERSON, Trustee of COSMOPOLITAN POWER COMPANY, Bankrupt,
Appellee.

49

SUGGESTIONS OF APPELLANT IN OPPOSITION TO MOTION OF APPELLEE FOR LEAVE TO ASSIGN CROSS-ERROR, OR FOR THE ALLOWANCE OF A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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SUGGESTIONS OF APPELLANT IN OPPOSITION TO MOTION OF APPELLEE FOR LEAVE TO ASSIGN CROSS-ERROR, OR FOR THE ALLOWANCE OF A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

This is a motion by the appellee for leave to assign cross-error with respect to a portion of the decree of the Court of Appeals, which is not involved in appellant's present appeal to this Court. On *May* 11, 1905, Mr. Justice Day allowed the present appeal upon a certificate that the determination of the particular

question involved was essential to a uniform construction of the Bankruptcy Act. On *November* 13, 1905, appellee moved to dismiss the appeal herein on the ground that the determination of the particular question was *not* essential to a uniform construction of the bankruptcy act. That motion was submitted on briefs and thereafter denied. Nearly nine months after unsuccessfully contending that the appeal was improperly allowed, appellee interposes his present motion to assign cross-error. It is necessary to a proper understanding of the questions involved in the present motion to refer but very briefly to the record.

The Cosmopolitan Power Company (the bankrupt) is a corporation organized under the laws of the State of New Jersey April 30, 1900. A petition in bankruptcy was filed against it on April 23, 1903, and it was thereafter adjudicated a bankrupt. The franchise taxes due the appellant, the State of New Jersey, by the bankrupt, for the years 1902 and 1903, were not paid. The 1902 taxes ($5,750) were assessed November 7, 1902, and the 1903 taxes ($2,500) were assessed June 1, 1903, after the filing (April 23, 1903), of the petition in bankruptcy. The latter assessment, however, was made for the year beginning *January* 1, 1903. The State of New Jersey filed its claim for the taxes for the years 1902 and 1903 and thereafter moved for an order on the trustee to pay the same as a *preferred* claim. The Referee and the District Court allowed the claim for the 1902 taxes as a *general* claim, but denied the claim for the 1903 taxes *in toto*, on the ground that the taxes were not owing at the date of the filing of the petition in bankruptcy. An appeal

was prosecuted by the State of New Jersey to the Court of Appeals for the Seventh Circuit. That court allowed the claim of $2,500 for the 1903 taxes as a *general* claim, but in other respects affirmed the judgment of the District Court, and denied priority to any part of the claim of appellant. (See 137 Fed. Rep. 858.)

Thereafter, on May 11, 1905, Mr. Justice Day allowed the appeal of appellant under the provisions of Section 25, Clause 2, of the Bankruptcy Act, which provides *inter alia* that an appeal may be had from any final decision of a Court of Appeals allowing or rejecting a claim,

> "Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

The appeal was prosecuted for the purpose of determining the question as to whether a franchise tax was entitled to priority by virtue of the provisions of Section 54, Subd. A of the Bankruptcy Act, upon which question there is a sharp conflict in the decisions.

The question as to whether the claim for the 1903 taxes was properly allowed as a general claim is in no way whatever involved in the present appeal, nor is a decision upon that question essential to a uniform construction of the Bankruptcy Act. The appellee is attempting to assign cross-error in respect to the action of the Court of Appeals in allowing the claim for the 1903 taxes. In the suggestions in support of their motion, counsel for appellee say:

> "Appellee could not appeal from the decree of the Circuit Court of Appeals, since the only question involved in such an appeal would be whether or not the Circuit Court of Appeals was right in allowing a general claim for the license fee of 1903. That did not involve a question which might have been taken on appeal or writ of error from the highest court of a state to this court; *nor did it involve a question whose determination is essential to a uniform construction of the Bankruptcy Act throughout the United States.* Under Sec. 25, of the Bankruptcy Act, these are the only cases in which an appeal may be had to this court. *Appellee was, therefore concluded* by the decree of the Circuit Court of Appeals."

This admission necessarily leads to a denial of the pending motion.

The decision of the Court of Appeals with respect to the allowance of the 1903 taxes was final, and as the determination of that question is not essential to a uniform construction of the bankruptcy act, no appeal could be taken under the provisions of Section 25, Clause 2 of the Bankruptcy Act.

It is the settled practice of this court that when an appellee has not prosecuted, or cannot prosecute an appeal to this court, he can only be heard in support of the decree, and cross-errors cannot be assigned.

In *Chittenden* v. *Brewster*, 2 Wall., 191, the appellee objected that certain material facts in the bill had not been proven and it was contended that the defect was fatal to the complainant. This court said:

> "This would be so, if the appellees, against whom the decree was rendered, had appealed from the same. * * * But here the complainants only have appealed, and the rule is settled in the

appellate court, that a party not appealing *cannot take advantage of an error in the decree committed against himself*, and also, that the party appealing cannot allege error in the decree against the party not appealing. If the appellees desired to avail themselves of this error in the decree, *they should have brought a cross appeal.* By omitting to do so, they admit the correctness of the decree as to them. The case stands before the appellate tribunal the same as if the error had been waived at the hearing."

In *The Slavers*, 2 Wall., 383, it was said:

"Parties who have not appealed are not entitled to be heard in this court, except in support of the decree in the court below. They cannot ask for a reversal in the appellate court. * * *"

In *The "Stephen Morgan,"* 94 U. S., 599, the court held:

"Parties who do not appeal from a final decree of a circuit court which is regular in form cannot be heard in opposition to the decree when the cause is removed here by the opposite party, unless it appears that the proceedings in removing the cause were unauthorized or irregular. They may be heard in support of the decree, and in opposition to every assignment of error filed by the appellants."

And again in *United States* v. *Blackfeather*, 155 U. S., 180, 186, this court said:

"As the claimant took no appeal from the judgment of the court below, of course we are not called upon to consider the numerous errors assigned in his brief to its action in refusing to make certain allowances claimed in his petition. *The Stephen Morgan*, 94 U. S., 599. We are concerned only with the appeal of the government from the allowances actually made, and shall limit

our decision to the errors assigned by the Attorney General in his brief."

To the same effect see:

Mail Co. v. *Flanders,* 12 Wall., 130, 135;
The Mabey, 13 Wall., 738;
Ewing v. *City,* 5 Wall., 413;
Alviso v. *United States,* 8 Wall., 337.

And it is equally well settled in this court that an appellee cannot assign cross-errors where an appeal has not or cannot be taken by such appellee.

In *The Maria Martin,* 12 Wall., 31, 40, the court said:

> "Both parties in a civil action may sue out a writ of error, to a final judgment, but where one party only exercises the right, *the other cannot assign error in the appellate court.* * * * Where each party appeals each may assign error, but where only one party appeals, *the other is bound by the decree in the court below, and he cannot assign error in the Appellate Court,* nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken."

And in *Clark* v. *Killian,* 103 U. S., 766, this court expressly held that it would not consider errors assigned by the appellee.

In *Bolles* v. *Outing Co.,* 175 U. S., 262, 268, the court concludes:

> "It is sufficient to say of these that the defendant did not take out a writ of error and cannot now be heard to complain of any adverse rulings in the court below." (Citing cases.)

In the recent case of *Guarantee Co.* v. *Phenix Insurance Co.* (C. C. A. 8th Cir.), 124 Fed., 170, the court

reviews the authorities and arrives at a similar conclusion, saying (pp. 172, 173):

> "No decisions in the federal courts in which this rule has been disregarded or doubted have been called to our attention, and none have rewarded a diligent search. The rule has been in force for so many years that it is not now a matter of reason, but a question of practice. It is to be determined not only by an independent consideration and decision of what the rule ought to be, but by a view of the precedents in the national courts which disclose the practice that has been and is prevailing in those courts. The decisions and opinions to which reference has been made disclose the fact that this uniform practice has been and is in accordance with the following rules: * * *
>
> A defendant in error who does not sue out a writ of error, or an appellee who does not take an appeal, cannot confer jurisdiction upon an appellate court to consider or decide questions suggested by an assignment or an argument of cross-errors, nor can he be heard upon such questions."

To the same effect see:

Gage v. *Pumpelly*, 115 U. S., 454, 463;

Bldg. & Loan Assn. v. *Logan*, 66 Fed., 827 (C. C. A. 5th Cir.).

And in other jurisdictions the rule exists that assignments of error are only allowable when the party making the assignment could have supported a separate and distinct appeal.

2 Ency. Pl. & Pr., p. 971n.

Wright v. *Evans*, 53 Ala., 103.

Holdsomebeck v. *Fancher*, 20 So., 519; 112 Ala., 469.

And where an appeal is taken from a particular part of a judgment or decree, or where the Appellate Court acquires jurisdiction to determine a particular question, cross-errors cannot be assigned as to that part of the judgment or decree not brought up by such appeal.

Walker v. *Pritchard*, 121 Ill., 221;
Vol. 2 Cyclo. of Law & Proced., p. 1011.

In the present case, as we have pointed out, the appeal was taken with respect only to the question of the priority of the tax, and therefore no error can be assigned with respect to the other portions of the decree not appealed from.

Counsel refer to the case of *United States Rubber Co.* v. *American Oak Leather Co.*, 181 U. S., 434, as establishing a contrary doctrine. The question as to the right to assign cross-errors was not involved, raised or discussed in that case. A writ of *certiorari* was allowed upon the *petition* of certain of the defendants and the *cross-petition* of the complainants.

In that very case (see p. 444) "an *appeal* and a *cross-appeal* were taken to the Circuit Court of Appeals." Other than in the fact that the name of one of the learned counsel for appellee appeared on the brief of one of the parties in that case, we can find no relevancy in the citation.

It is also urged as an alternative motion that a writ of *certiorari* should issue to revise the judgment of the Court of Appeals allowing the claim of appellant for the 1903 taxes. The only question that exists with respect to those taxes is whether they are a provable claim. The Referee and the District Court dis-

allowed the claim for the 1903 taxes, on the ground that the liability was not fixed at the time of the filing of the petition in bankruptcy. The petition was filed April 23, 1903. Under the law the tax in question is assessed upon the capital stock of the corporation, issued and outstanding January 1st preceding (Laws of N. J. 1901, p. 31.) It is there provided that

> "All corporations * * * shall make annual return to the State Board of Assessors on or before the first Tuesday of May in each year, and shall state therein the amount of the capital stock of such corporation *issued and outstanding on the first day of January preceding the making of said return.*" * * *

In 1903 the corporation made a return (Rec., 45), stating the amount of its capital stock issued and outstanding on January 1st of that year. It is upon this return that the assessment was made. Even though this assessment was not made until after the filing of the petition in bankruptcy, it is a provable claim because the making of the assessment was a mere ministerial duty on the part of the board to figure out the amount of the statutory tax due, viz.: one-tenth of one per cent.

Section 63 A of the Bankruptcy Act provides that certain debts may be proved against the bankrupt estate. Under this section it is immaterial when a debt is *payable*. It is sufficient if the liability be *fixed* at the time the petition is filed. The amount of the tax was fixed by the statute and the proceedings of the assessors thereafter could not change the basis of the tax. *Certum est quod certum reddi potest.*

It will be noticed that "taxes" are not specified in

the list of provable debts referred to in section 63. Taxes are covered by section 64. That section states that the court *shall order the trustee* to pay all taxes legally due and owing by the bankrupt.

Section 63 contains an express limitation that the debts shall be owing "at the time of the filing of the petition." Section 64 contains no such limitation. It is well settled that a discharge in bankruptcy does not discharge a liability to the state for taxes: In Collier on Bankruptcy (5th Ed.), p. 208, under the head of "What Debts Are Not Dischargeable," it is said:

> "*Liabilities to the State.*—This follows from the doctrine that the liabilities to the sovereign will not be affected, unless he by express words extends the provisions of a statute to himself. Indeed, it is thought that taxes would be excepted from the general dischargeability of provable debts, even were the statute silent. There is hardly enough in Section 64A, giving them priority of payment, to warrant the claim that the sovereign intended to waive his exemption here. *Besides, the words used in Section 63A seem to take taxes out of the class known as 'provable debts,' and thus they could not be discharged in any event.*"

In the *U. S. Car Co. case*, 60 N. J. Eq., 514, the exact contention was passed upon. The court said:

> "But it is contended on behalf of the receivers that even if it be considered that this 'tax' was properly laid, still, by force of the statute under which it was assessed, it became 'a debt due to the state *when determined*,' and that, as it was not 'determined' until some months after the receivers were appointed, it was, distinctly, not a debt of the corporation at the time of their appointment, and consequently is not payable out of the assets in their hands, for the reason that, by their appointment, such assets were converted into a trust fund for *then existing creditors.*" * * *

> It is manifest, therefore, that when the 'tax' is assessed against an insolvent corporation, after the appointment of a receiver, the fund out of which its payment must be preferred is that which is in his hands, for there is no other fund upon which it can be charged, and consequently in no other way can each of these two statutory provisions be given full force and effect."

And on page 516 the court said that the tax was due—

> "Without regard to the solvency or insolvency of the corporation, the value or want of value of its franchises, or whether or not it is exercising them, either by its officers and directors or through a receiver. The sole test, in determining its liability to comply with those conditions, so long as they remain unrevoked, *is the existence or non-existence of the corporation.*"

It thus appears that the taxes are expressly made a preferred claim against the trustee, even though they are not assessed until after the petition in bankruptcy is filed. A discharge in bankruptcy would not bar the claim of the state against the corporation, as under the decision in the Car Co. case, the corporation is liable until its charter is surrendered to the state.

The Court of Appeals in its opinion said:

> "As to the $2,500 item, the question is whether it was a debt owing on April 23, 1903, when the petition was filed. The promise of the bankrupt, as we construe it, was to pay on or before the 1st of July in each year a sum based on the amount of stock issued and outstanding on the 1st day of January of that year. On January 1, 1902, the amount of stock issued and outstanding was $10,000,000. That determined the amount, even though the stock was reduced to $2,500,000 on May 13, 1902, long before the obligation matured and could be sued upon. Prior to January 1, 1903,

> the promise to pay on or before July 1, 1903, did not evidence an accrued debt, because it could not be known whether any stock would be outstanding-ing when the 1st of January should come around. But on that date we think the promise accrued to pay one-tenth of one per centum on $2,500,000 of stock then outstanding. That the claim bore no interest and could not be sued upon before the 1st of July affects only the maturity of the obligation."
>
> (See 137 Fed., 858, 863.)

As already shown, counsel for appellee admit in the suggestions filed in support of the present motion, that a decision upon the question of the allowance of the 1903 taxes is not essential to a uniform construction of the Bankruptcy Act. It is needless to cite authority in this Court that the power to issue the writ of *certiorari* is most sparingly exercised, and then only in cases of great gravity and importance.

Whether a particular claim is or is not due at the time of the filing of a petition in bankruptcy is not a question of such gravity or importance as to justify resort to such an extraordinary remedy.

The present application for a writ of *certiorari* should be treated the same as though no appeal had been allowed to appellant. If no appeal were now pending we apprehend that appellee would not be bold enough to ask for a writ of *certiorari* to review the decree of the Circuit Court of Appeals allowing as a general claim the $2,500 taxes due the State of New Jersey for 1903.

Respectfully submitted.

LEVY MAYER,

ROBERT H. MCCARTER,

Attys for State of New Jersey.

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No. 49.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

[redacted]

THE STATE OF NEW JERSEY,
Appellant,

vs.

WILLIAM F. ANDERSON, Trustee of COSMOPOLITAN POWER COMPANY, Bankrupt,
Appellee.

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT FOR APPELLANT.

LEVY MAYER.
ROBERT H. McCARTER.
Attorneys for Appellant.

The Gunthorp-Warren Printing Co.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 302.

THE STATE OF NEW JERSEY, *Appellant*, *vs.* **WILLIAM F. ANDERSON, Trustee of COSMOPOLITAN POWER COMPANY, Bankrupt,** *Appellee.*	Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT FOR APPELLANT.

Statement of Facts.

This is an appeal from a judgment of the Circuit Court of Appeals for the Seventh Circuit, affirming, in part, an order entered by the District Court (Kohlsaat, J.), confirming (without opinion) the finding of the referee (Eastman) on the claim of the appellant, State of New Jersey, for franchise taxes due it from the estate of the Cosmopolitan Power Company, bankrupt. (See 137 Fed., 858.) The claim was filed December 21, 1903, for a preference for $9,254.90, under the provisions of Sec. 64, Subd. a of the Bankruptcy Act,

which gives preference to *all taxes* legally due and owing by the bankrupt. The claim is made up as follows:

"Tax—1902	$5,750.00
Interest to October 15, 1903	891.25
Costs on injunction proceedings, because of non-payment of taxes	26.15
Tax—1903	2,500.00
Interest to October 15, 1903	87.50
	$9,254.90"

(Rec., 4.)*

The Cosmopolitan Power Company (the bankrupt) is a corporation organized under the laws of New Jersey, on April 30, 1900. Its principal office is in Jersey City, N. J. (Rec., 21.) It was organized for the purpose of manufacturing and dealing in engines, machines, vehicles, materials and merchandise of all kinds. (Rec., 21.) It had express charter power to do business in any state or territory of the United States. (Rec., 22.) All of its property was located in Illinois. (Rec., 11.) Its capital stock on January 1, 1902, was $40,000,000, of which $10,000,000 was issued and outstanding. (Rec., 11.) On May 13, 1902, its capital stock was reduced to $2,500,000. (Rec., 11, 29.) No franchise taxes have been paid to the State of New Jersey for the years 1902 and 1903. (Rec., 11.)

An involuntary petition in bankruptcy was filed against the Cosmopolitan Power Company on April 23, 1903, and the company was thereafter duly adjudicated a bankrupt. (Rec., 11.)

On November 7, 1902, the State Board of Assessors of New Jersey, upon the failure of the Cosmopolitan

*The references are to the pages of the original record.

Company to make a return, levied an assessment for license tax against the company for the year 1902 of $5,750. (Rec., 17.) On June 1, 1903, there was assessed against the company for the year beginning January 1, 1903, a similar tax of $2,500 (Rec., 30), in accordance with the return of the company, which return was filed on May 2, 1903. (Rec., 27.)

On February 12, 1904, a motion was made for an order on the Trustee to pay the claim *as a preferred claim,* in advance of the payment of dividends to the creditors of said estate. (Rec., 26.) Objections were filed to the claim by the Trustee (Rec., 2) on the ground that the claim was not entitled to priority; also that it was not properly provable against the estate. The referee disallowed, *in toto,* the 1903 tax, and allowed the 1902 tax *as a general claim* for only the sum of $4,943.08 (Rec., 10), and appellant thereupon filed its petition for review. (Rec., 12.) Thereafter, on September 12, 1904, the District Court (Kohlsaat, J.) affirmed the order of the referee (Rec., 32), without rendering an opinion. An appeal was prosecuted to the United States Circuit Court of Appeals for the Seventh Circuit. That court allowed the claim of $2,500 for the 1903 taxes as a general claim, but in other respects affirmed the judgment of the District Court, and denied priority to any part of the claim of appellant.

An appeal was thereupon taken to this court, under the provisions of Section 25, Clause 2 of the Bankruptcy Act, upon the certificate of Mr. Justice Day that the determination of the questions involved was essential to a uniform construction of the Bankruptcy Act.

The motion of appellee to dismiss the appeal was thereafter denied.

The errors relied on by appellant are:

1. That the court erred in holding that the franchise tax, upon which the claim is based, was not such a claim as was entitled to priority under Section 64a of the Bankruptcy Act of 1898.

2. That the court erred in holding that the said license fee or franchise tax was not a tax.

3. That the court erred in allowing the claim of appellant as a general claim and not as a preferred claim.

4. That the court erred in not allowing the claim of appellant as a preferred claim for the sum of $9,254.90.

5. That the court erred in holding that the franchise tax assessed against the bankrupt for the year 1902, amounting to $5,750 and the interest thereon, was not such a claim as was entitled to priority under Section 64a of the Bankruptcy Act of 1898.

6. That the court erred in holding that the franchise tax assessed against the bankrupt for the year 1903, amounting to $2,500 and the interest thereon, was not entitled to priority under Section 64a of the Bankruptcy Act of 1898.

7. That the court erred in reducing the claim of appellant for the franchise tax of 1902 from $5,750 to $4,250.

Appellee obtained leave in this court to assign cross-error with respect to the action of the Court of Appeals in allowing the claim of appellant for the franchise tax or license fee for the year 1903.

BRIEF.

I.

THE CLAIM OF THE APPELLANT IS A TAX WITHIN THE MEANING OF THE BANKRUPTCY ACT AND IS ENTITLED TO PRIORITY AS SUCH.

Tennessee v. *Whitworth*, 117 U. S., 129, 136.

State v. *Evening Journal Ass'n*, 47 N. J. L., 36.

State Board of Assessors v. *Central R. R. Co.*, 48 N. J. L., 146; s. c., 4 Atl., 578.

Standard Cable Co. v. *Attorney General*, 46 N. J. Eq., 270; s. c., 19 Atl., 733.

Pipe Line Co. v. *Berry*, 52 N. J. L., 308, 311; s. c., 19 Atl., 665.

Trenton Savings Fund v. *Richards*, 52 N. J. L., 156; 18 Atl., 582.

Honduras Commercial Co. v. *State Board of Assessors*, 54 N. J. L., 278; s. c., 23 Atl., 668.

Lumberville Bridge Co. v. *Assessors*, 55 N. J. L., 529; s. c., 26 Atl., 711.

State v. *Board of Assessors*, 61 N. J. L., 461; s. c., 39 Atl., 638.

Hancock; Comptroller v. *Singer Mfg. Co.*, 62 N. J. L., 289; s. c., 41 Atl. Rep., 846.

Mutual Mercantile Agency, 8 Am. Bank Reps., 435.

Myers v. *Campbell*, 64 N. J. L., 186; s. c., 44 Atl., 863.

Ches. & O. Ry. Co. v. *Atlantic Transp. Co.*, 62 N. J. Eq., 751; s. c., 48 Atl., 997.

Mayor, etc., of Newark v. *State Board*, 51 Atl., 67; s. c., 67 N. J. L., 246.

Arimex Cons. Copper Co. v. *State Board*, 54 Atl., 244; s. c., 69 N. J. L., 121.

Hardin v. *Morgan*, 70 N. J. L., 484; 57 Atl., 155.

W. U. Tel. Co. v. *Massachusetts*, 125 U. S., 530.

Massachusetts v. *W. U. Tel. Co.*, 141 U. S., 40, 45.

Wilmington R. R. Co. v. *Reid*, 13 Wall., 264.

Atlantic & Pacific Tel. Co. v. *Philadelphia*, 190 U. S., 160.

Western Union Tel. Co. v. *Missouri*, 190 U. S., 412.

14 Am. & Eng. Ency. of Law (2nd Ed.), p. 6.

27 Am. & Eng. Ency. of Law (2nd Ed.), pp. 578, 932.

I. C. R. R. Co. v. *Decatur*, 147 U. S., 190, 199.

City of Camden v. *Allen*, 26 N. J. L., 398.

1st Nat. Bank v. *Aultman, Miller & Co.*, 12 Am. Bank Reps., 12.

2 Cook on Corporations (5th Ed.), 561-3.

a.

In re United States Car Co., 60 N. J. Eq., 514; s. c., 43 Atl., 673.

In re Danville Rolling Mill Co., 121 Fed., 432, distinguished.

II.

AN OBITER DICTUM IS NOT BINDING ON THE COURT.

Cohens v. *Virginia*, 6 Wheat., 264, 399.

Carroll v. *Lessee of Carroll*, 16 How., 275, 286, 287.

Frants v. *Brown*, 17 S. & R. (Pa.), 292.

Northern Bank v. *Porter Township*, 110 U. S., 608, 615.

Matz v. *C. & A. R. R. Co.*, 85 Fed., 180.

2 Rose's Notes to U. S. Reports, 81-2.

Rohrback v. *Germania Fire Ins. Co.*, 62 N. Y., 47, 58.

9 Ency. of Law, 2d Ed., 452.

ARGUMENT.

I.

ARE THE TAXES IN QUESTION ENTITLED TO PRIORITY?

Sec. 64, Subd. a of the Bankruptcy Act, upon which the claim of appellant is based, provides as follows:

> "The court shall order the Trustee to pay *all taxes* legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court." (30 Stat. L., 563.)

The objection made to the allowance of the claim, is that it is not a claim for taxes within the meaning of this section. The principal question here involved, therefore, is whether a franchise tax comes within the meaning of the phrase, "all taxes legally due and owing" to the state, etc.

Prior to the present decision there were two cases decided by the District Courts involving this identical question. One of these cases (*In re Mercantile Agency*, 8 Am. B. Rep., 435), decided September 3, 1902, in the Southern District of New York, sustains the preferential character of a precisely similar claim, and the other (*In re Danville Rolling Mill Co.*, 10 Am. B. Rep., 327), decided April 3, 1903, in the Eastern District of Pennsylvania, holds that the claim is not a tax. The latter decision makes no reference to the earlier hold-

ing, and it is a fair presumption that it was not called to the attention of the court.

The earlier case (*In re Mutual Mercantile Agency*) relies conclusively upon *Hancock* v. *Singer Mfg. Co.*, 62 N. J. L., 289; s. c., 41 Atl., 846 (decided Nov. 14, 1898), while *In re Danville Rolling Mill Co.*, with equal confidence seeks support in the U. S. Car Company's case, 60 N. J. Eq., 514; s. c., 43 Atl., 673 (decided July 7, 1899). The language relied on in that case to the effect that a franchise tax *is not a tax* is pure dictum, as we believe we will be fully able to demonstrate hereafter.

The law under which the present tax was assessed is the Act of April 18, 1884 (Laws of N. J. of 1884, Chap. 159), as amended. (Dill's Corporation Law of New Jersey, edition of 1903, pp. 151-163.) The act is entitled, "An Act to provide for the imposition of *State taxes* upon certain corporations and for the collection thereof." Section 1 provides that:

> "All corporations * * * shall pay an annual license fee or *franchise tax* of one-tenth of one per centum on all amounts of capital stock issued and outstanding up to and including the sum of $3,000,000."

The same section further provides for the making of a return on or before the first Tuesday of May of the amount of stock outstanding on the preceding January first.

Section 2 provides that on failure of the corporation to make return, the State Board of Assessors shall fix the "annual license fee or franchise *tax*," and the amount so fixed "shall stand as the *basis of taxation*" under the act.

Section 3 provides that the State Board of Assessors shall report to the Comptroller on or before the first Monday of June in each year, a statement of the basis of "the annual license fee or *franchise tax*" and the "amount of *tax*" due, which *tax* shall thereupon be due and payable, and that if the *tax* remains unpaid on July 1st, interest shall be charged.

Section 4 provides:

> "*Such tax*, when determined, shall be a debt due from such company to the state, for which an action at law may be maintained after the same shall have been in arrears for the period of one month; such *tax* shall also be a preferred debt in case of insolvency."

Section 5 provides that in addition to other remedies for the collection of such *tax*, it shall be lawful whenever any *tax* shall remain in arrears for three months, to apply for an injunction to restrain the corporation from the exercise of any franchise or the transaction of any business until the payment of such *tax*.

Section 6 provides that if any corporation shall for two consecutive years fail to pay any *tax* which shall be assessed against it, the charter shall be void unless further time is given for the payment of such *taxes*.

Section 7 provides for making a list of delinquent corporations which fail to pay *taxes*.

Section 10 provides for the appointment of a receiver to enforce the collection of *taxes*.

It will be noticed that in every section of the Statute the charge is referred to and characterized as a *tax*. In every decision under this act (and there are many

of them) the nature of this charge has been discussed and its character as a *tax* has been firmly established.

In *Tennessee* v. *Whitworth*, 117 U. S., 129, 136, this court classified the various elements of corporate taxation as follows:

> "In corporations four elements of taxable value are sometimes found: 1, *franchises;* 2, capital stock in the hands of the corporation; 3, corporate property; and 4, shares of the capital stock in the hands of the individual stockholders. *Each of these is, under some circumstances, an appropriate subject of taxation.*"

The tax here in controversy is clearly *a franchise tax* and falls under the first classification of the foregoing decision. The question, however, is set at rest by the decisions of the courts of New Jersey, which, upon the present inquiry, are of controlling authority.

In *State* v. *Evening Journal Assn.*, 47 N. J. L., 36 (decided 1885) the license fee imposed under the Act of 1884 is held to be a tax. The court said:

> "By the fourth section of this act a tax in the shape of a yearly license fee was laid upon certain companies. * * * In the same section it was further enacted that all other corporations, incorporated under the laws of this state and not thereinbefore provided for, should pay a yearly license fee or *tax* of one-tenth of one per cent. on the amount of the capital stock of such corporation * * * Pamph. L, 1884, p. 234. It is true that the Act of 1884 imposes *the tax* by way of a license for exercising corporate franchise, but *the tax* is laid with respect to the capital stock of such corporations and for the privilege of doing business in this state."

In *State Board of Assessors* v. *Central R. R. Co.*, 48 N. J. L., 146; s. c., 4 Atl. 578 (decided 1886), the Act

of 1884 was again construed. The report of the case covers more than 200 pages. Throughout the opinion will be found decisive language to the effect that the charge in question is a tax.

In *Standard Cable Co.* v. *Attorney General*, 46 N. J. Eq., 270; s. c., 19 Atl., 733 (decided 1889), the nature of the tax in question was again discussed. The Cable Company was a New Jersey corporation, carrying on its business in another state, precisely as did the bankrupt in the present case. It was contended that the tax was violative of the constitutional provision that property shall be assessed for taxation under general and uniform laws. The court said:

> "The fault of this position is the assumption that *this tax is one upon property.* Such, manifestly, is not the case. The law in question *imposes a tax* on certain corporations by way of a license *for exercising corporate franchises.* It is declared to be *such tax* by the act, and, although it is laid on this class of corporations with respect to the capital stock, *the tax possesses the legal quality of a license or franchise tax. Evening Journal Association* v. *State Board of Assessors*, 18 Vr., 36; Cooley Tax. (2nd Ed.), 379, and cases cited.
>
> "Upon the power of the legislature to *impose such a tax*, there exists no restriction in our constitution. As a license *or franchise*, it is not within the *equality* clause of the constitution referred to."

It was also contended that the company was engaged in interstate commerce and was therefore exempt. The court said:

> "These grounds impress me only by their novelty. Our general laws for the organization of corporations permit companies to transact their business in other States. It certainly has not

been supposed that the exercise of this right put them beyond the reach of *taxation* everywhere, or brought them into any relations whatever with the provision in the federal constitution referred to. *No case is cited giving the slightest countenance to the notion that to hold a charter from one state, when the corporate property is located, or corporate business transacted, in another state, relieves the corporation in both or either state from taxation in any form which the legislative power may, under its State Constitution, adopt;* nor any case in which these conditions are given the slightest consequence in ascertaining the limit of the state power to *tax* either the property of the corporation where such property has its situs, *or its franchises in the state which granted them.*"

The court, speaking of the system of taxation under the Act of 1884, continued:

"Under that system, tax is laid on the corporation, business or property when its corporate operations or property are here. *When its real business and property are elsewhere, and out of state protection, a tax on the franchises and privileges upheld by the state alone is imposed.* Such a system is as near an approach to that equality which is desirable in all taxation as any other scheme that may be suggested."

In *Pipe Line Co.* v. *Berry* (decided 1890), 52 N. J. L., 308, 311; s. c., 19 Atl., 665, it is said:

"The Act of 1884 requires all the enumerated corporations doing business in this state to *pay an annual tax, for the use of the state, by way of a license for their corporate franchises.*"

And on appeal in the same case (53 N. J. L., 212; s. c., 21 Atl., 490, decided November, 1890), the court said:

"The prosecutor was assessed and *paid a tax* under the Act of April 18, 1884, entited, 'An Act

to provide for the imposition of *state taxes* upon certain corporations and for the collection thereof.' Rev. Sup., p. 1016.

"Taxation under the Act of 1884 *was designed to provide revenue for the state."*

And again in *Trenton Savings Fund* v. *Richards*, 52 N. J. L., 156; s. c., 18 Atl., 582 (decided 1892), an imposition, on savings banks similar to that imposed by the Act of 1884, was upheld as a tax. The court said:

"The *tax* is, in our judgment, to be regarded *as a personal tax*, chargeable upon this class of artificial persons either *because of the franchises which they enjoy*, or because of the business which they do."

And in *Honduras Commercial Co.* v. *State Board of Assessors*, 54 N. J. L., 278; s. c., 23 Atl., 668 (decided 1892), a tax was levied under the Act of 1884 upon a New Jersey corporation *whose sole business was conducted and whose capital was invested in the Republic of Honduras.* The court said:

"The tax imposed *is a franchise tax* exacted from the company *as the price of the right and privilege*, which it received from the state, *of being a corporation.* Although the amount to be paid is determined by the amount of the capital stock and the duration of the corporate life, yet these are only the *criteria* chosen by the legislature for ascertaining the probable value of the corporate franchise which the company assumed. *The tax is not levied upon the corporate property or business. Standard Underground Cable Co.* v. *Attorney General*, 1 Dick., Ch. Rep., 270.

"Such a tax may be collected by the state granting the corporate franchise, *no matter how the property of the company may be invested or employed, or where it may be situate."*

And in *Lumberville Bridge Co.* v. *Assessors*, 55 N. J. L., 529; s. c., 26 Atl., 711 (decided 1893), the Act of 1884 is again construed. The court said:

> "The franchise *that is taxed as property* is the privilege enjoyed by a corporation of exercising certain powers derived from the state, whereas the franchise with which we have to do is *the right to exist in corporate form* without reference to the powers that under such form the company may exercise. * * * It is, in short, *a poll tax* levied upon domestic corporations for the right to be. Such a *tax*, is not upon property or assets, and does not in any way concern the nature of the business the company may be authorized to carry on."

And in *State* v. *Board of Assessors* (decided 1898), 61 N. J. L., 461; s. c., 39 Atl., 638, to quote the syllabus, it is held that:

> "The *tax* imposed by 'An Act to provide for the imposition of *state taxes* upon certain corporations and for the collection thereof,' approved April 18, 1884, and its supplements (Gen. Stat., pp. 3335 *et seq.*), is *a franchise*, not a property, *tax*, and is not subject to diminution because some of the capital of the corporation taxed is invested in rights under letters-patent of the United States, not *taxable* as property."

In *Hancock, Comptroller*, v. *Singer Mfg. Co.*, 62 N. J. L., 289; s. c., 41 Atl., 846 (decided November 14, 1898), the exact question here in controversy was decided. This was the case upon which the decision in *In re Mutual Mercantile Agency*, 8 Am. Bank. Rep., 435, *supra*, was based, where it was held that the tax here in controversy was entitled to priority. The Singer case was argued at great length by eminent counsel, the report covering 64 pages. The facts in that case were as follows:

The State Board of Assessors imposed a franchise tax upon the entire capital stock of the company, less the assessed value of its real and personal property in New Jersey. The assessment was imposed under the corporation tax act of 1884, as amended in 1892, which is the same law as that under which the present assessment was made. The Singer Company, which was organized in New Jersey under a special charter, contended that it was exempt under that charter from liability to the assessment imposed. The charter provided that upon certain conditions—

> "The real and personal property of the said corporation not actually and in fact within the State of New Jersey, and the stock of the said corporation held or owned by any of its stockholders, *shall not be liable to any tax or impost whatsoever.*"

It was contended for the state, that a *license tax* was not a tax in the sense that the word was used in the charter.

The court held that an exemption of the shares of a corporation from taxation would also exempt the corporation, as a burden upon the company would be a burden upon its shares. In overruling the contention of the state that the license fee *was not a tax,* the court said:

> "The Act of 1884 (Pamph. L, p. 232) is entitled 'An Act to provide for the imposition *of state taxes* upon certain corporations and for the collection thereof.'
>
> "In this act this imposition is called a yearly license fee *or tax.*
>
> "In a supplement passed to the Act of 1884 (Pamph. L, 1891, p. 150) it is styled '*a tax.*'
>
> "In a further supplement passed in 1892

(Pamph. L, p. 136), it is called 'an annual license fee *or franchise tax.*'

"It is wholly immaterial what name may be given to it. The fact that it is called a 'license fee' or '*franchise tax*' cannot validate it. It is levied under an act passed 'to authorize the impostion of *state taxes,*' and it is none the less an interdicted imposition, *and none the less a tax because it is given a new name.*

"Although under our adjudications it is not *a tax on property* in a sense which brings it within article 4, section 7, paragraph 12, of our State Constitution, *it is a tax on the capital stock of the corporation.* Otherwise the act would be manifestly void for want of a title expressing its object, and the state would be deprived of all its *revenue* under the Act of 1892. The franchise of the company is the *right* to hold property and *exercise its corporate privileges.* The Supreme Court of the United States has decided that where a corporation is exempted from taxation, it is not subject to a tax on its franchise. *Wilmington Railroad Co.* v. *Reid,* 13 Wall., 264."

The opinion of the court was concurred in by nine Justices, including Chancellor McGill, Chief Justice Magie and Justices Depue, Ludlow, Van Syckel, Adams, Bogert, Hendrickson and Nixon, a fact which will be of apt interest when we later discuss the U. S. Car Co. case, 60 N. J. Eq., 514, relied on by the appellee.

In the matter of *Mutual Mercantile Agency,* 8 American Bankruptcy Reports, p. 435, decided September 3, 1902, the facts were as follows: The Mutual Mercantile Agency, a New Jersey corporation, was adjudicated a bankrupt on the 25th day of October, 1901, in the Southern District of New York. On the 28th day of February, 1902, the State of New

Jersey filed a proof of claim for a franchise tax assessed upon the corporation *for the year* 1901. The claim was objected to by the Trustee in Bankruptcy, on the ground that it was not a tax within the meaning of the Bankruptcy Law, and was not therefore entitled to priority. The referee referred to section 64, subdivision A, of the Bankrupt Law, and said:

> "In the case of *Hancock, Comptroller,* v. *Singer Mfg. Co.,* reported in 62 N. J. L., 289, the highest court of the State of New Jersey, has *in no uncertain way* decided that the franchise tax *was a tax.* In this case of *Hancock* v. *Singer Mfg. Co.*, the question came before the court for its decision as to whether or not a 'franchise tax' or 'license fee' *was a tax.* In the said case, the State of New Jersey had given a charter to the Singer Mfg. Co. with the following exemption:
>
> "The exemption in the charter is in these words: 'The real and personal property of the said corporation not actually in fact within the State of New Jersey, and the stock of the said corporation held or owned by any of its stockholders, shall not be liable *to any tax* or impost whatsoever.'
>
> "The comptroller contended that the exemption from tax or impost did not include license, and therefore the state had a right to assess a license.
>
> "The attorneys for the company contended that the license fee is still an annual exaction imposed *for the purpose of public revenue.* Such exactions have always been held to be *taxes* by whatever name they happen to be called. *Western Union Telegraph Co.* v. *Mass.,* 125 U. S., 536, 547; *Illinois Central Railroad Co.* v. *Decatur,* 147 U. S., 190-199; *Patterson* v. *Society for Useful Mfgs.,* 4 Zabr., 385, 400. See especially *Tennessee* v. *Union & Planters' Bank,* 9 Yerg., 490; *Worth* v. *Petersburg Railroad Co.,* 89 N. C., 301."

The referee quoted the opinion of Justice Van Syckel in the Hancock case, *supra,* to the effect that the imposition in question was a tax, and concluded:

> "This case is controlling. To hold otherwise would be to deny the State of New Jersey a priority under the above-mentioned section, *as all of the revenue of the State is raised by franchise tax,* except a small school tax.
>
> "There is nothing in the Bankruptcy Act to suggest an intention of Congress, in the use of the word 'tax' *to limit the meaning to any particular kind of tax.*
>
> "Therefore, an order may be entered allowing the aforesaid claim of the State of New Jersey as a priority claim and directing the trustee to pay the same."

This decision was affirmed by the District Court.

The only New Jersey case cited as holding a contrary doctrine is *In re United States Car Co.,* 60 N. J. Eq., 514, s. c., 43 Atl., 673 (decided July 7, 1899). The facts were as follows: The State of New Jersey assessed a state tax against the car company, under the Act of 1884, *subsequent* to the entry of a decree of insolvency and the appointment of receivers. The receivers did not have sufficient assets to pay the debts of the company; nor was the business of the company continued in any way, nor its franchises exercised *after* the appointment of the receivers. The court said:

> "The question presented for decision by this court is whether under these circumstances the state is entitled to priority in payment, out of the assets in the hands of a receiver, of a *tax* assessed against the corporation, *after his appointment.*
>
> "In the court below it was considered that the liability of a receiver to pay such *tax,* to the detriment of the general creditors, depended upon

whether the franchises of the company were a valuable asset in his hands, and whether he continued to use them, *after his appointment,* for the benefit of the creditors and stockholders of the corporation, and, reaching the conclusion that in the case now before us *the corporate franchises were valueless, and it being admitted that they had not been used by the receivers,* the court decreed that the *tax* assessed was not payable out of the funds in their hands until after all indebtedness existing at the time of the appointment of the receivers was discharged.

"*We cannot concur in this view.* Although the statute designates an imposition of this kind as a license fee or franchise tax, it plainly *is not a tax upon corporate franchises.* In fact, it is not, *strictly speaking,* a tax at all, nor has it the elements of one. It is in reality an arbitrary imposition laid upon the corporation, without regard to the value of its *property* or of its *franchises,* and without regard to whether it exercises the latter or not, *solely as a condition of its continued existence.* The state, in creating a corporation, has the right to impose upon its creature such conditions as the legislature, within constitutional limits, may deem proper, and the acceptance by the corporation of the franchises, powers and privileges conferred upon it binds it to the performance of those conditions so long as it continues to remain in possession of those franchises, powers and privileges, and the conditions themselves remain unrevoked by the legislature. And this is so without regard to the solvency or insolvency of the corporation, the value or want of value of its franchises, or whether or not it is exercising them, either by its officers and directors or through a receiver. The sole test, in determining its liability to comply with those conditions, so long as they remain unrevoked, *is the existence or non-existence of the corporation.*

"Applying *this* test, it is quite clear that the so-called *tax* was *properly* imposed in the present

case. At the time of its imposition, although the company had been decreed to be insolvent, no decree of dissolution had been pronounced against it, but, on the contrary, its corporate life was continued for the benefit of its creditors pending the final distribution of its assets."

The court, therefore, *reversed* the lower court (*Crews* v. *U. S. Car Company*, 57 N. J. Eq., 357) and directed *preferential* payment to be made.

The haphazard statement that the tax in question was "not, strictly speaking, a *tax*" was not called for by any issue in the case and was clearly *obiter*.

It was not necessary to decide, in determining this question, whether the imposition in question was or was not a tax. The only issue, as the court itself said, was whether the charge was payable if it was imposed *after the appointment of a receiver*. The court decided that payment must be made, because of the provision of the New Jersey act (Section 6) that

> "*Such* TAX *shall be a preferred debt in case of insolvency.*"

A reading of the case in both the lower and appellate courts demonstrates that the language in question is utterly *obiter*.

It was wholly immaterial to the case whether it was or was not a tax. Whether it was or was not a tax it was still entitled to priority under the express words of the act above quoted.

But even if the language of the court cannot be considered as *dicta*, the court did not intend to hold, and in fact did not hold, that the imposition in question *was not a tax*.

The court says:

> "It plainly is not a tax *upon corporate franchises.* In fact it is not, *strictly speaking,* a tax at all."

It was contended that inasmuch as the receivers had not exercised the corporate franchises, they were not liable for the tax (Opin., p. 515)—in other words, that the tax was conditioned upon *the actual exercise and user of the corporate franchises.* The court answered this contention by the language above quoted, to the effect that it was *not a tax upon corporate franchises,* but a tax upon the corporation *for the mere privilege of existing,* and not upon the *actual user* of its corporate powers.

The court, when it said that it was "not *strictly speaking* a tax," had in mind the long line of its own decisions to the effect that the license fee imposed under the Act of 1884 was not a *property* tax within the meaning of the constitution of New Jersey which provides that

> "*property* shall be assessed for *taxes* under general laws and by uniform rules, according to its true value." (Art. 4, Sec. 7, Subd. 12.)

In other words, the court meant and said that the tax was not a *property* tax as the courts of New Jersey had repeatedly theretofore held.

Neither on principle nor authority can it be contended that the word "tax" as used in the Bankruptcy Act (Sec. 64, Subd. A) applies only to a "*property tax.*"

The word "*tax*" is not there used in a restricted sense. The act expressly provides that "*all taxes*" shall be paid.

In the Car Company case the court *allowed* the preference of the state in the insolvency proceedings. In doing so the court necessarily must have held that the claim was a *tax* because the New Jersey statute (Sec. 6) only allows a preference to a *tax*. It provides:

> "Such *tax* shall also be a *preferred* debt in case of insolvency."

The court said that it was not a tax, "*strictly speaking,*" *because it had not the elements of a tax.* The only element lacking in the present tax is that of *uniformity* which is required by the New Jersey Constitution, *and this element, as the courts of New Jersey have repeatedly held, is only essential to a* PROPERTY *tax.* The present tax is assessed under an act in regard to "*state taxes.*" It is levied in substantially the same manner as other state taxes and the act (as was expressly held in *Pipe Line Co.* v. *Berry,* 52 N. J. L., 308, *supra*) was designed to provide revenue for the state.

The present tax, if it were considered as a *property tax,* would violate the New Jersey Constitution, but inasmuch as the courts of New Jersey have held that the constitutional provision in question has no application to the present tax, it is none the less *a tax* because it lacks an element which is essential only to a particular kind of tax, *i. e., a property* tax. But the Bankruptcy Act applies to taxes in general and to "*all taxes,*" and not merely to property taxes. That the court in the Car Company case did not hold that the imposition was not a tax in its general sense, and in the sense that the word is used in the Bankruptcy Act, is evident not only from the *previous,* but also from the subsequent decisions of the same court.

In the Car Company case (decided July 7, 1899), the majority opinion was concurred in by nine justices, viz.: Depue, Van Syckel, Dixon, Garrison, Lippincott, Gummere, Ludlow, Bogert and Vredenburgh.

The Singer Mfg. Co. case had been before the highest court of New Jersey on two occasions. The first was *Singer Mfg. Co.* v. *Heppenheimer, Comptroller,* 58 N. J. L., 633 (decided 1896). Of the nine judges who concurred in the majority opinion in the Car Co. case, the following six concurred in the opinion in the first Singer case: Depue, Gummere, Lippincott, Van Syckel, Bogert, and Dixon. That opinion was unanimous. In the second Singer case (62 N. J. L., 289), decided November 14, 1898, twelve judges sat. Justice Vredenburgh concurred in the conclusion; and the opinion itself was concurred in by nine other justices. Of the nine who decided the Car Co. case, *seven* concurred in the various opinions in the Singer cases. In fact both opinions in the Singer cases were written by Justice Van Syckel, who was one of the *concurring* justices in the Car Co. case. Justice Gummere, who wrote the opinion in the Car Co. case, was one of the *concurring* justices in the first Singer case. This leaves only Justices Garrison and Dixon, who dissented in the second Singer case, to be accounted for. Both Justices Garrison and Dixon, however, are on record on this very question. In the following cases Justice Dixon has passed upon the act of 1884 here under discussion, in cases where the license fee in question was clearly held to be a tax.

Standard Cable Co. v. *Atty. General,* 46 N. J. Eq., 270; s. c., 19 Atl., 733.

State Board v. *Central R. R. Co.,* 48 N. J. L., 146; s. c., 4 Atl., 578.

State v. *Richards,* 52 N. J. L., 156; s. c., 18 Atl., 582.

Honduras Co. v. *State Board,* 54 N. J. L., 278; s. c., 23 Atl., 668.

In the following cases of the same character, Justice Garrison concurred in holding the charge to be a tax.

Standard Cable Co. v. *Atty. General,* 46 N. J. Eq., 270; s. c., 19 Atl., 733.

Lumberville Bridge Co. v. *Assessors,* 55 N. J. L., 529; s. c., 26 Atl., 711.

The last Singer case was decided November 14, 1898. The Car Co. case was decided July 7, 1899, less than eight months later. The Singer case is on all fours with the one at bar and is a conclusive holding that the present assessment is a tax. It cannot be seriously contended that the judges who decided the Car Co. case intended that the long line of previous and consistent decisions should be overruled. *The Car Co. case does not even make* the slightest reference to any of them. The inadvertent *dictum,* therefore is only an instance where

"Even the worthy Homer sometimes nods."

The Singer case was argued twice in the Supreme Court of Errors by eminent counsel, and the well reasoned opinion of the court shows mature and thorough deliberation. But a reading of both the Singer case (62 N. J. L., 289) and the Car Company case (60 N. J. Eq., 514), shows that in fact there is no real conflict between them. The language of the Car Company

case, even if it were not mere *dictum*, cannot be construed as holding that the imposition in question is not a *tax* within the meaning of that word, *as it is used in the Bankruptcy Act*. The language of the court in the Car Company case must be construed with reference to the facts in that case and read in the light of the prior decisions of the same court. When this is done the contention that the franchise tax is not a tax will fall and opposing counsel can then well say:

"Nor is it Homer nods, but we that dream."

In *Cohens* v. *Virginia*, 6 Wheat., 264, 399, Chief Justice Marshall, in speaking of some *dicta* of the same court in an earlier case, said:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, *but they ought not to control the judgment in a subsequent suit when the very point is presented for decision.* The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

This language is quoted with approval in *Carroll* v. *Lessee of Carroll*, 16 How., 275, 286, 287, where the court said (p. 286):

> "If the construction put by the court of a state upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then according to the principles of the common law, an opinion on such a question is not a

decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of parties to whom the property in contestation belongs.

And therefore this court and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties."

In *Frantz* v. *Brown*, 17 S. & R. (Pa.), 292, Houston, J., said:

"If general *dicta*, in cases turning on special circumstances, are to be considered as establishing the law, nothing is yet settled or ever can be long settled. An eminent judge (Benson) has left us, in one of the New York cases, an animated appeal against charging him as liable for the correctness of *dicta*, on points not trying: and I join him, most cordially. What I have said or written out of the case trying, or shall say or write in such circumstances, may be taken as my opinion at the time, without argument or full consideration; but I will never consider myself bound by it, when the point is fairly trying and fully argued and considered. And I protest against any person considering such *obiter dicta* as my deliberate opinion."

And to like effect are:

Northern Bank v. *Porter Township*, 110 U. S., 608, 615.

Matz v. *C. & A. R. R. Co.*, 85 Fed., 180.

2 Rose's Notes to U. S. Reports, 81-2.

Rohrback v. *Germania Fire Ins. Co.*, 62 N. Y., 47, 58.

9 Ency. of Law, 2d Ed., 452.

That the Car Co. case is not regarded as departing from the Singer case, is strengthened by the fact that

the Singer case is approvingly cited in the *subsequent* case of

> *Myers* v. *Campbell*, 64 N. J. L., 186; s. c., 44 Atl., 863 (November 13, 1899—*several months after the Car Co. decision*).

In *Ches. & O. Ry. Co.* v. *Atlantic Transp. Co.* (Court of Errors & Appeals, N. J.), 62 N. J. Eq., 751; s. c., 48 Atl., 997, decided March 4th, 1901, the franchise tax under the act of 1884 is again characterized *as a tax.* In that case, the tax was levied by the state *during a receivership* of an insolvent corporation and the court held that it was entitled to payment in preference to the liabilities incurred by the receiver in carrying on the business of the insolvent corporation.

And in *Mayor, etc., of Newark* v. *State Board*, 51 Atl., 67 (Court of Errors & Appeals), 67 N. J. L., 246; decided January 27, 1902, it was held that a franchise of a corporation was taxable as such. The opinion was rendered by Justice Gummere, who before that had rendered the decision in the Car Co. case, *supra.*

And in *Arimex Cons. Copper Co.* v. *State Board*, (Sup. Ct. N. J.), 69 N. J. L., 121; s. c., 54 Atl., 244, decided February 24, 1903, the assessment under the act of 1884, is again referred to as a tax. The court saying:—

> "the legal basis *of the tax* is the capital stock issued and outstanding."

And again in *Hardin* v. *Morgan*, 70 N. J. L., 484, s. c., 57 Atl., 155, decided February 23, 1904, the assessment is again described as a tax.

And in the act of March 29, 1904 (Chap. 219, Laws of N. J., 1904), the legislature, in an act providing for

the reinstatement of corporations for non-payment of annual franchise taxes, again refers to the assessment as a tax.

When the Singer case was pressed upon the attention of the Court of Appeals as a controlling authority, the court said:

> "But if we are mistaken, and if the Singer Company case is to be accepted as an authoritative decision that the charge in question is a tax, *we do not believe that the United States Bankruptcy Courts are bound to follow it blindly.* THE QUESTION WITH THEM IS THE INTERPRETATION AND APPLICATION OF Section 64a. If the legislature of a state gives the name tax to an exaction which is not a tax, and if the courts of a state join in the misnomer, surely the bankruptcy courts are not required to disregard the substance of the thing, to the detriment of other claimants. The state courts may authoritatively expound the substance and the Federal courts will adopt such exposition; but whether the substance constitutes a tax or not is independent of the name. And moreover, the latter part of Section 64a seems to direct the bankruptcy courts to determine independently the 'legality of any such tax.' "

This holding of the court to the effect that it is not bound to follow the state decisions as to what constitutes a tax is contrary to the decided cases.

In re Ott, 2 A. B. R., 637 (Dist. Ct. So. Dist. of Ia., East Div.), s. c., 95 Fed., 274, Judge Woolson, in a lengthy opinion, holds that the decisions of the highest courts of the state, as to whether or not a particular charge is a tax, are binding on the Federal courts sitting in bankruptcy, saying:

> "I am convinced that this court must follow the state court on this matter."

And in the matter of *Emmerman* v. *Ohio Steel & Iron Co.*, 13 Am. B. R., 40 (Dist. Ct. No. Dist. of Ohio, E. D.), Referee Doyle said:

> "In determining what is a tax in the respective states, the bankruptcy courts look to the laws and decisions of such states."

This decision was affirmed by Judge Wing on January 9, 1905.

It has been uniformly held that the construction placed by the highest courts of a state upon a statute of such state, is controlling upon the Federal Court.

Sec. 721, Rev. Stats. of U. S.
Bell v. *Morrison*, 1 Pet., 351.
D'Wolf v. *Rabaud*, 1 Pet., 476.
Burgess v. *Seligman*, 107 U. S., 20.

Appellee relies on *In re Danville Rolling Mill Co.*, 121 Fed., 432, decided by District Judge McPherson (Eastern Dist. of Penn.), April 3, 1903. That case is based solely on the Car Co. decision, and if that furnishes no support, the Rolling Mill case as an authority fails. None of the prior decisions of the New Jersey courts is referred to by Judge McPherson, whose opinion is brief and blindly follows the *obiter* in the Car Co. case.

The courts of New Jersey, however, do not stand alone in their holdings to the effect that the imposition of an annual franchise fee is a tax. In fact, the decisions of the courts throughout the country are unanimous to that effect.

In *W. U. Tel. Co.* v. *Massachusetts*, 125 U. S., 530, in speaking of a charge of this character this court says:

"But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an *excise* upon the capital of the corporation."

And in *Massachusetts* v. *W. U. Tel. Co.*, 141 U. S., 40, 45, this court said:

"By whatever name the *tax* may be called, as described in the laws of Massachusetts, it is essentially an *excise* upon the capital of the corporation; and those laws attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution *to the support of its government* upon the amount and value of the capital so employed by it therein."

In *Wilmington R. R. Co.* v. *Reid*, 13 Wall., 264, a statute exempted all the property of a railroad from taxation. The state imposed a franchise tax upon the corporation. This court said:

"It is insisted, however, that the tax on the franchise is something entirely distinct from the property of the corporation, and that the legislature therefore, was not inhibited from taxing it. *This position is equally unsound with the others taken in the case.* Nothing is better settled than that the franchise of a private corporation—which in its application to a railroad is the privilege of running it and taking fare and freight—is property, and of the most valuable kind, as it cannot be taken for public use even without compensation. It is true, it is not the same sort of property as the rolling stock, road bed, and depot grounds, but it is equally with them covered by the general term '*the property of the company*,' and, therefore, equally within the protection of the charter."

In the recent case of *Atlantic & Pacific Telegraph Co.* v. *Philadelphia*, 190 U. S., 160, decided June 1, 1903, this court at p. 163 said:

> "The franchise of a corporation, although that franchise is the business of interstate commerce, is, *as a part of its property,* subject to state taxation providing at least the franchise is not derived from the United States. *Delaware Railroad Tax,* 18 Wall., 206, 232; *Postal Tel. Cable Company* v. *Adams,* 155 U. S., 688, 696; *Erie Railroad* v. *Pennsylvania,* 158 U. S., 431, 437; *Central Pacific Railroad* v. *California,* 162 U. S., 91; *Western Union Telegraph Company* v. *Taggart,* 163 U. S., 1, 18; *Western Union Telegraph Co.* v. *Missouri, ex rel. Gottlieb, post,* 412."

And to like effect is *Western Union Tel. Co.* v. *Missouri,* in the same volume (190, p. 412).

And in 14 Am. & Eng. Ency. of Law (2nd Ed.), p. 6, many authorities are cited supporting the text that:

> "A franchise is an incorporeal hereditament and *therefore property.* It is a franchise for a number of persons to be incorporated and subsist as a body politic," etc.

In 27 Am. & Eng. Ency. of Law (2nd Ed.), 932, it is said:

> "Unless exempted in terms which amount to a contract the privileges and franchises of a private corporation are as much *a legitimate subject of taxation* as other taxable subjects which are within the sovereign power of the state."

In the notes will be found a great array of supporting authorities, both Federal and State.

In *I. C. R. R.* v. *Decatur,* 147 U. S., 190, 199, "taxes" are defined as "burdens, charges, or impositions put or set upon persons or property for public uses."

And in 27 Ency. of Law (2nd Ed.), p. 578, "taxes" are defined as follows:

> "Taxes are generally defined as burdens or charges imposed by legislative authority on per-

> sons or property to raise money for public purposes, or, more briefly, 'an imposition for the supply of the public treasury.' "

In *City of Camden* v. *Allen*, 26 N. J. L., 398, the court said:

> "A tax is an impost levied by authority of government, upon its citizens or subjects, for the support of the state."

In *1st Nat. Bank* v. *Aultman, Miller & Co.* (June 13, 1904), Vol. 12 Am. Bank. Rep., p. 12 (Northern District of Ohio) the referee held that a franchise tax owing by a corporation to the State of Ohio, was a provable claim in bankruptcy and entitled to priority. This case relies on *Southern Gum Co.* v. *Laglin*, 66 Ohio St., 578, s. c., 64 N. E., 564, which squarely holds that an annual corporate franchise tax of one-tenth of one per cent. on the issued and outstanding stock is a tax.

A similar conclusion was reached by Referee Doyle in *Matter of Emmerman* v. *Ohio Steel & Iron Co.* (Dist. Court, N. Dist. of Ohio, E. D.), 13 Am. B. R., p. 40, decided June, 1904, which decision was affirmed by Judge Wing on January 9, 1905.

The subject is also fully discussed in 2 Cook on Corporation (5th Ed.), 561-563.

We believe that the authorities (with the exception of the opinion of Judge McPherson) are unanimous to the effect that the tax in question comes within both the spirit and meaning of clause 64A of the Bankruptcy Act. If the imposition is not a tax, it is difficult to discover what it is. If it is not a tax, what is it?

This difficulty was evidently shared in by the Court of Appeals in holding that the imposition was not a tax. The Court says:

> "If it be conceded that the word 'taxes' in Sec. 64a includes every contribution to the support of government which any state may exact from the persons, occupations and possessions of its citizens and corporate subjects, is the charge in question a tax? It is not a capitation tax, for it is not laid upon corporations by the head. It is not an occupation tax, for it has no regard to the business in which the corporations engage. It is not a property tax, for it pays no heed to the extent or value of property, as the state constitution requires. Franchises are property. The franchise to be and the franchise to do both go wherever the corporation goes; both are property. *Adams Express Co.* v. *Ohio,* 166 U. S., 185, 224. A state may grant franchises and then tax them as property, just as it may grant or lease land and then tax the granted estate as property. But the tax upon the estate is not to be confused with the consideration for the grant. If one pays a lump sum or annual sums as the consideration for the grant, he does so by virtue of a contract; but he is not thereby relieved from the sovereign demand, *in invitum. And that is the distinguishing feature of a tax,—the sovereign does not bargain with his subject, he commands.* The statute here under consideration does not purport to be an amendment of the incorporation laws of the state. But when the incorporators of the bankrupt came to seek a charter, this statute expressed one of the terms on which it could be obtained and held. The sovereign state could not command the incorporators to accept a charter; it could only say, if you do accept it, you must pay so and so for the grant."

And again, in upholding the action of the referee in reducing the assessment for the year 1902 from $5,750

to $4,250 and replying to appellant's suggestion that the action of the taxing authorities in fixing the amount of the tax was not subject to collateral attack, the court below said:

> "Appellant insists that the action of the state board was *quasi* judicial and is not subject to collateral attack. This contention would require consideration, if the charge were a tax. *Holding it to be a liability under a contract,* we find no error in the court's looking to the contract for the measure of the liability."

This position, however, is answered in the case of *In re Danville Rolling Mill Co.,* 121 Fed., 432, *supra,* relied on by appellee. It was there contended that this identical tax imposed a "contractual obligation" upon the corporation. The court (McPherson, J.) said:

> "This argument is ingenious, but I do not regard it as sound. * * * Certainly, the ordinary meaning of the phrase, 'a contract, express or implied,' *does not include the public duties that a corporate creature owes to its sovereign creator.* If it includes the duty to pay lawful annual charges, it also includes the duty to obey all other laws; and since 'debt' in the Bankruptcy Act, means 'any debt, demand or claim provable in bankruptcy,' it would follow logically that any money claim of the state against a corporation, arising out of a violation of law, would be also provable. It seems to me impossible to stretch the language of this clause so far as to include the subject now under consideration."

And on reason and principle it is difficult to conceive how the charge can be ranged in the class of contract liabilities.

The Court of Appeals says:

> "If one pays a lump sum or annual sums as

> the consideration for the grant, he does so by virtue of a contract; but he is not thereby relieved from the sovereign demand, *in invitum.*"

The charge in question lacks all the elements of a contract. It applies equally to those corporations which were organized before its passage. The tax is measured by the amount of the issued capital stock, and under the laws of New Jersey, as under the laws of every other state, the capital stock represents property. The Court of Appeals concedes that a state may grant franchises and then tax the granted estate as property. The present tax is clearly a *franchise tax.* Section One of the Act under which it is levied so designates it. Section 2 of the same Act provides that the assessors shall fix the "annual license fee or franchise tax" and that the amount so fixed "shall stand as the *basis of taxation*" under the Act. The tax is similarly designated throughout the remaining sections of the law. In the long line of New Jersey decisions referred to, *supra,* the character of the charge as a tax on corporate franchises is clearly established. Thus, in *Standard Cable Co.* v. *Attorney General,* 46 N. J. Eq., 270, *supra,* the court said:

> "The law in question imposes *a tax* on certain corporations by way of a license for exercising corporate franchises. It is declared to be such *tax* by the act, and, although it is laid on this class of corporations with respect to the capital stock, *the tax possesses the legal quality of a license or franchise tax. Evening Journal Association* v. *State Board of Assessors,* 18 Vr., 36; Cooley Tax (2nd. Ed.), 379, and cases cited.
>
> "Upon the power of the legislature to impose *such a tax,* there exists no restriction in our constitution. As a license or franchise, it is not within the equality clause of the constitution referred to."

A corporation paying an annual license fee for the privilege of exercising its corporate franchise, does not do so by virtue of any *agreement*. The state undoubtedly has the right to increase or decrease the annual franchise tax, or abolish it entirely, as the "sovereign has not bargained with his subject," and the subject can therefore make no complaint. If the obligation to pay were founded in contract, could one party against the consent of the other increase the amount to be paid in its discretion? If the obligation is a contract obligation, why was it necessary to provide as was done by Section 4 of the Act, that an action at law might be maintained to recover the same? The charge possesses none of the elements of a contract, and lacks none of the elements of a tax. It clearly would not be subject to set off or barred by the statute of limitations. The statute creating it designates it as a tax, a long line of decisions thereunder so treats it; it is raised for the purpose of revenue, and the proceeds are payable into the treasury of the state. It is laid, *in invitum* as much so as any other tax. To call it an "arbitrary imposition" makes it none the less a tax. All taxes are more or less arbitrary impositions. To deny that the charge is a tax is to deny to a species the protection which is accorded to its genus.

In an effort to properly classify the charge in question, the Court of Appeals points out that it is not a capitation tax, nor an occupation tax, nor a property tax. If we concede that it is neither the one nor the other of these things, the concession would be wholly immaterial. To obtain priority under section 64a it is not essential that the tax be either a capitation tax,

an occupation tax or a property tax. The Bankruptcy Act is not restricted to any particular species of tax. It applies, *in terms,* to *"all taxes"* without any limitation or qualification whatsoever. The language is clear and explicit and free from any ambiguity.

In the matter of the Mutual Mercantile Agency, 8 Am. Bank. Rep., pp. 435, 437, it is said:

> "There is nothing in the Bankruptcy Act to suggest an intention of Congress in the use of the word 'tax' to limit the meaning to any particular kind of tax."

The misconception underlying the decision of the referee upon this particular question is that section 64A of the Bankruptcy Act is restricted to *strictly property taxes.* The referee said:

> "One of the fundamental principles of taxation is that the property to be taxed should be within the jurisdiction of the state imposing the tax. It is a bare exercise of this franchise exercised solely in the State of Illinois which constitutes the ground of the New Jersey claim, all property of the bankrupt being situate in the State of Illinois; to hold that the State of New Jersey could collect this amount as a priority would be extending to the State of New Jersey privileges which I find no precedent for allowing. It seems to me that the kind of tax contemplated by the Bankruptcy Statute is one *that is a lien on the property out of which the collection is to be made,* and it can hardly be claimed that one state has a lien on property out of its jurisdiction."

This is a misconception of both the purpose and meaning of the Bankruptcy Act. Suppose the bankrupt had had personal property in New Jersey, and that it had been assessed therefor $1,000. Thereafter and before the tax became due the property was de-

stroyed. Referee Eastman holds that "the kind of tax contemplated is one that is a *lien* on the property out of which the obligation is to be made." It is elementary that a tax is *not* a lien on the property. There is no common law rule which makes a tax a lien (27 Am. and Eng. Enc., 2nd Ed., 735, *Heine* v. *Levee Commissioners,* 19 Wall., 655).

Under the referee's ruling, the $1,000 tax could not be proved against the estate of the bankrupt. Such a doctrine does not square with any principle of law known to the books, nor can such an intention be attributed to Congress.

In *Heine* v. *Levee Commissioners,* 19 Wall., 655, it was said:

> "Nor need we decide whether taxes once lawfully levied are, until paid, a lien on the property against which they are assessed, though it is laid down in the very careful work of Judge Dillon, that taxes are not liens upon the property against which they are assessed, unless made so by the charter, or unless the corporation is authorized by the legislature to declare them to be liens."

In the note to the above case (Rose's Notes, Vol. 8, p. 283) a long line of cases will be found following the Heine case and holding that a tax is not a lien unless made so by statute. The New Jersey rule is the same.

In *State* v. *Van Horn,* 45 N. J. L., 136, 137, it is said:

> "It is conceded that taxes become liens on property solely from express legislation to that effect. Cooley on Taxation, 305; *Heine* v. *Levee Com'rs,* 19 Wall., 655."

And in *Cadmus* v. *Fagan*, 47 N. J. L., 549, 552, it is said:

> "It is completely settled that taxes, whether general or special imposed by reason of peculiar benefits conferred by a public improvement, become a lien on land only by virtue of express legislation. The power to impose the lien necessarily includes the power to limit its extent and duration. Cooley on Taxation, 305; *Heine* v. *Levee Com'rs*, 19 Wall., 655; *State, Society, &c., pros.*, v. *Paterson*, 13 Vroom, 615; *Johnson* v. *Van Horn*, 16 Vroom, 136."

There is nothing in the bankruptcy law which restricts the meaning of the word "tax" either to property taxes, or to taxes which are a lien on the property out of which the collection is to be made. If Congress intended to restrict priority to any particular species of tax, it would have expressed its intention by words to that effect. It has not done so

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THE AMOUNT OF THE 1902 TAXES.

The claim of appellant for the 1902 taxes was allowed for $4,250. The assessment for that year was $5,750. In that year the corporation neglected to make a return as required by the Act, and the board of assessors, under the provisions of the Act, (sec. 2) fixed the amount at $5,750 on the amount of the *authorized* capital stock ($40,000,000). As a matter of fact but $10,000,000 of the stock was issued and outstanding, and if the corporation had made a return the tax would have been but $4,250.

The Act provides (sec. 2) that on failure of the cor-

poration to make a return as required by section 1 of the Act, the State Board of Assessors shall fix "the annual license fee or franchise tax" and *"the amount so fixed by them shall stand as such basis of taxation under the Act."*

It is clear, as a matter of fact, that the assessors based their assessment on the authorized capital stock instead of upon the issued capital stock. This is chargeable, however, to the failure of the corporation to make a report as required by law. In the absence of such a report, the board of assessors made their assessment according to law. The referee, however, usurped the functions of the board of assessors and figured the assessment on the basis of the issued capital stock.

It is needless to cite from authorities to the effect that in this collateral proceeding the assessment in question cannot be assailed. It is binding on all the world unless impeached in a direct proceeding in the courts of New Jersey. (*Arimex Copper Co.* v. *Board of Assessors*, 69 N. J. L., 121.) The statutes of New Jersey expressly provide a means for the readjustment of excessive or unjust taxes (Laws of New Jersey of 1897, p. 178; also Dill's Corporation Law of N. J., Ed. of 1903, p. 161).

Yet the Court of Appeals affirmed the action of the referee and held that as the liability was one under a contract, there was no error in the court's looking to the contract for the measure of liability. In speaking on this subject, the Court of Appeals said:

> "This contention would require consideration if the charge were a tax. Holding it to be a liability *under a contract*, we find no error in the

courts looking to the contract for the measure of the liability."

The Court of Appeals justified the action of the referee in reducing the 1902 tax by reference to the provisions of Sec. 64a of the Bankruptcy Act. The court said:

> "Moreover the latter part of Sec. 64a seems to direct the bankruptcy courts to determine independently the legality of any such tax."

The latter portion of Sec. 64a is as follows:

> "In case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court."

This section does not justify the referee in revising a *valid* assessment. That section might apply *if the tax were void;* but as the tax is regular on its face it cannot be assailed collaterally, and it is immaterial that the assessment would have been lower if the corporation had made a return. Even if it were conceded that for this reason the assessment was *erroneous,* this would be far from involving the *"legality"* of the tax.

Again, Section 162 of the Taxing Law provides an adequate remedy if an assessment is either unjust or excessive. The contention that the tax is subject to collateral attack is also conclusively set at rest by the provision of the New Jersey Statute, Sec. 1, Subd. 547 (title "Taxes") Vol. 3 Gen. Stat. of New Jersey, which is as follows:

> "That no tax, assessment or water rate, imposed or levied in this state, shall be set aside or reversed in any court of law or equity in any action, suit or proceeding for any irregularity or defect in form, or illegality in assessing, laying, or

levying any such tax, assessment or rate, or in the proceeding for collecting the same, if the person against whom, or the property upon which such tax, assessment or rate is assessed or laid is, in fact, liable to taxation, or assessment or imposition of such water rate, in respect of the purposes for which such tax, assessment or rate is levied, assessed or laid; and the court in which any action, suit or proceeding is or shall be pending to review any such tax, assessment or water rate is required to amend all irregularities, or errors, or defects, and is empowered, if need be, to ascertain and determine for what sum such person or property was legally liable to taxation, or assessment, or water rate, and by order or decree to fix the amount thereof; and the sum so fixed shall be the amount of tax, assessment or water rate for which such person or property shall be liable, and the same shall be and remain a first lien or charge upon the property and persons, and collectible in the manner provided by law, the same as if such tax, assessment or water rate had been legally levied, assessed or imposed in the first instance by the city, town, township, commission, board or other authority attempting to make, impose or levy the same; it shall be the duty of the court to make a proper levy, imposition or assessment in all cases in which there may lawfully be an assessment, imposition, or levy; and such court is hereby given full and ample authority to make a lawful levy, assessment or imposition."

And in *State* v. *Dodge*, 47 N. J. L. 436, s. c. 2 Atl. 810, it was held that the curative force of the above act embraces all the steps necessarily taken in levying the public revenues.

And see also numerous authorities cited in the annotations to the above section to the effect that the act must be liberally construed.

THE 1903 TAXES.

Cross-error has been assigned with respect to the action of the Court of Appeals in allowing appellant's claim of $2,500 for the 1903 taxes.

The referee disallowed the claim on the ground that it was not a fixed liability at the time of the filing of the petition in bankruptcy. The petition was filed April 23, 1903. Under the law, the tax in question is assessed upon the capital stock of the corporation, issued and outstanding on January 1st preceding (Laws of N. J., 1901, p. 31; Dill's Corporation Laws of N. J., Ed. of 1903, p. 152).

It is there provided that "All corporations * * * shall make annual return to the State Board of Assessors on or before the first Tuesday of May in each year, and shall state therein the amount of the capital stock of such corporation *issued and outstanding on the first day of January preceding the making of said return* * * *"

The tax is payable in advance for the ensuing year. And so it was held in *Hardin* v. *Morgan*, 70 N. J. L., 484, s. c., 57 Atl., 155; see, also, *Brewing Improvement Co.* v. *Assessors*, 65 N. J. L., 466; s. c., 47 Atl., 426.

In 1903 the corporation made a return (Rec., 27), stating the amount of its capital stock issued and outstanding on January 1st of that year. It is upon this return that the assessment was made. Even though this assessment was not made until after the filing of the petition in bankruptcy, it is a provable claim because the making of the assessment was a mere ministerial duty on the part of the board to

figure out the amount of the statutory tax due, viz., one-tenth of one per cent.

Again, Section 63a of the Bankruptcy Act provides that certain debts may be proved against the bankrupt estate. Under this section it is immaterial when a debt is *payable*. It is sufficient if the *liability to pay* is *fixed* at the time the petition is filed. The amount of the present tax is regulated by the statute and the proceedings of the assessors thereafter cannot change the basis of the tax. *Certum est quod certum reddi potest.*

It will also be noticed that "taxes" are not specified in the list of provable debts referred to in section 63. Taxes are covered by section 64. Under that section taxes are a charge against the estate, and are, in effect, an expense of administration. This is evidenced by the language to the effect that the court *shall order the trustee to pay all* taxes legally due and owing by the bankrupt.

Section 63 contains an express limitation that the debts shall be owing "at the time of the filing of the petition." Section 64 contains no such limitation and it is immaterial whether the taxes are, or are not owing at the time of the filing of the petition. It is well settled that a discharge in bankruptcy does not discharge a liability to the state for taxes. In Collier on Bankruptcy (5th Ed.), p. 208, under the head of "What Debts Are Not Dischargeable," it is said:

> "*Liabilities to the State.*—This follows from the doctrine that the liabilities to the sovereign will not be affected, unless he by express words extends the provisions of a statute to himself. Indeed, it is thought that taxes would be excepted

from the general dischargeability of provable debts, even were the statute silent. There is hardly enough in Sec. 64a, giving them priority of payment, to warrant the claim that the sovereign intended to waive his exemption here. *Besides, the words used in Sec. 64a seem to take taxes out of the class known as 'provable debts,' and thus they could not be discharged in any event.*"

In the U. S. Car Co. case, 60 N. J. Eq., 514, s. c., 43 Atl., 673, the exact contention was passed upon. The court said:

> "But it is contended on behalf of the receivers that even if it be considered that this 'tax' was properly laid, still, by force of the statute under which it was assessed, it became 'a debt due to the state *when determined,*' and that, as it was not 'determined' until some months after the receivers were appointed, it was, distinctly, not a debt of the corporation at the time of their appointment, and consequently is not payable out of the assets in their hands, for the reason that, by their appointment, such assets were converted into a trust fund for *then existing creditors.*
>
> * * * * *
>
> "It is manifest, therefore, that when the 'tax,' is assessed against an insolvent corporation, after the appointment of a receiver, the fund out of which its payment must be preferred is that which is in its hands, for there is no other fund upon which it can be charged, and consequently in no other way can each of these two statutory provisions be given full force and effect."

And on page 516 the court said that the tax was due—

> "Without regard to the solvency or insolvency of the corporation, the value or want of value of its franchises, or whether or not it is exercising them, either by its officers and directors or through a receiver. The sole test, in determining its lia-

bility to comply with those conditions, so long as they remain unrevoked, *is the existence or non-existence of the corporation.*"

It thus appears that the taxes are expressly made a preferred claim against the trustee, even though they are not assessed until after the petition in bankruptcy is filed. A discharge in bankruptcy would not bar the claim of the state against the corporation, as under the decision in the Car Company case the corporation is liable until its charter is surrendered to the state. Suppose the tax in question had been assessed against the tangible property while in the possession of the trustee; surely the trustee would be liable therefor. Wherein lies the difference between a corporate or franchise tax and the one supposed?

The Court of Appeals, in allowing the claim for the 1903 taxes, said:

"As to the $2,500 item, the question is whether it was a debt owing on April 23, 1903, when the petition was filed. The promise of the bankrupt, as we construe it, was to pay on or before the 1st of July in each year a sum based on the amount of stock issued and outstanding on the 1st day of January of that year. On January 1, 1902, the amount of stock issued and outstanding was $10,000,000. That determined the amount, even though the stock was reduced to $2,500,000 on May 13, 1902, long before the obligation matured and could be sued upon. Prior to January 1, 1903, the promise to pay on or before July 1, 1903, did not evidence an accrued debt, because it could not be known whether any stock would be outstanding when the 1st of January should come around. But on that date we think the promise accrued to pay one-tenth of one per centum on $2,500,000 of stock then outstanding. That the claim bore no interest and could not be sued upon before the 1st

of July affects only the maturity of the obligation."

(See 137 Fed., 858, 863.)

We submit that the claim of the state for the 1903 taxes should also be allowed.

While we recognize the intent of the Bankruptcy Act to create equality among creditors, and to provide for an equitable distribution of the bankrupt's estate, that principle is no more important, if indeed as important, as that which prompted Congress to require the payment of taxes as preferred claims. It has been truly said that taxes

> "are the wheels of government; and when taken away or clogged, government ceases to move; or rolls with a rickety and uncertain motion."
>
> *Mayor* v. *Feeley,* 66 Ga., 31.

Substantially the sole source of appellant's revenue is derived from the imposition of franchise taxes of the class under consideration. The State of New Jersey regarded them as so essential to a proper discharge of her sovereign duties that her legislature expressly provided that these taxes "be a *preferred* debt in case of insolvency"; and we believe it is clear that Congress had no intention to legislate to any different effect.

We submit that appellant's entire claim should be allowed as a preferred claim.

Respectfully submitted,

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 49

THE STATE OF NEW JERSEY,
Appellant,
vs.
WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt,
Appellee.

REPLY BRIEF OF APPELLANT.

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THE GUNTHORP-WARREN PRINTING CO., 119 E. RANDOLPH ST., CHICAGO

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REPLY BRIEF OF APPELLANT.

I.

It is first contended that the claim of appellant is not a tax, and cannot be allowed any preference over the other creditors of the bankrupt. As introductory to their argument, counsel advance the suggestion that if the claim of appellant is given priority, almost the entire estate will be absorbed. No such fact appears in the record, and if it did it would be entitled to no weight. The estate has already paid a dividend and various sums have been expended for attorneys' fees. Whether the claim of appellant is entitled to

priority is a question of law which this court will decide irrespective of the condition of the estate. The fact must not be lost sight of that the present is as regards the appellant a test case, and that the decisions in numerous suits pending in other circuits await the outcome of the present appeal. This is conceded by appellee. (Brief, p. 9.)

The sections of the New Jersey Statute under which the taxes in question are assessed, are set out by appellee on pp. 11-17 of his brief. Counsel then say:

> "It will be noted that the language of the New Jersey statute is not so clear and unambiguous as to create a tax by its terms."

This contention is not borne out by a reading of the Act. As pointed out, on pp. 9-10 of our opening brief, the imposition is designated throughout the Act as a tax, and until the decision in the case of *In re Danville Rolling Mill Co.*, 121 Fed., 432 (a decision rendered without reference to *Hancock* v. *Singer*), no one disputed the fact that it was a tax.

It is next suggested by appellee that on account of the "peculiar provisions" of the Act it is apparent that the state itself does not consider the imposition as a "*real tax.*" The first "peculiarity" advanced is that the words "license fee" and "franchise tax" are used interchangeably. This is not so. The term "license fee" is not used anywhere in the Act except *in conjunction* with the term "franchise tax." The Act refers to the charge as the "*annual license fee* OR *franchise tax.*" In many places throughout the Act the term "license *fee*" is not used. Thus in section 2 it is provided that the charge ,"shall stand as

the basis of *taxation.*" Section 3 provides *inter alia* that the assessors shall report "the amount of *tax* due," and that if "the *tax* of any company remains unpaid * * * the same shall bear interest * * *" and also that the assessors shall have power to require information from any corporation "subject to *tax,*" etc.

Section 4 says:

> "Such *tax* * * * shall be a debt," etc., and "such *tax* shall also be a preferred debt in case of insolvency."

Section 5 says:

> "In addition to other remedies for the collection of such *tax,*" etc., the corporation may be restrained from exercising its franchise until the payment of "such *tax.*"

It is thus apparent that nowhere in the law are the terms "license fee" and "franchise tax" used interchangeably, although the term, "license fee or franchise tax," is used in connection with the term, "such tax." If it were in any way doubtful as to whether the imposition was a mere license, or a tax, the designation of the charge throughout the law *as a tax,* would indicate its true character.

The next "peculiar" provision suggested, is that the tax is based entirely upon the *amount* of capital stock issued and outstanding regardless of its value or the property of the corporation.

We perceive nothing peculiar in this method of assessment. In fact, assessments measured by the amount of the capital stock are the most common form of franchise taxes. This court in *Horn Silver Mining*

Co. v. *New York,* 143 U. S., 305, upheld the validity of such a tax, and there said:

> "According to the law of most states this franchise or privilege of being a corporation is deemed personal property, and is subject to separate taxation."

And quoting from its decision in *Delaware Railroad Tax,* 18 Wall., 206, 231, this court said:

> " 'the state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion;' except, we may add, as that discretion is controlled by the organic law of the state. And, as we there said also, 'it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.' "

And again:

> "It may impose as a condition of the grant, as well as, also, *of its continued exercise,* the payment of a specific sum to the state each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed convenient and just. There is no constitutional inhibition against the legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation *or of its continued existence.* There can be, therefore, no possible objection to the validity of the tax prescribed by the statute of New York, *so far as it relates to its own corporations.*"

To the same effect, see *Vol.* 1, *Cooley on Taxation* (3rd ed.), pp. 153-4.

Stress is laid upon the fact that the tax in question is declared to be a debt, to collect which a suit may be instituted, the implication being that as the tax is declared to be a debt it ceases to be a tax. We answer this contention, pp. 21 *et seq, infra.* It is stated that no other remedies are given than such suit for the collection of the tax, except the forfeiture of the franchise. This is not so. Section 159 of the Act (set out at length on pp. 15-16 of appellee's brief) expressly provides that upon failure to pay the taxes for two consecutive years, the state may have a receiver appointed, and the court may enter a final decree for the payment of the taxes due, and issue execution therefor, which execution may be levied on any property in the state, including choses in action, patents, and licenses for patents.

After thus commenting upon the "peculiar" provisions of the Act, counsel conclude that the imposition is not regarded by the state as a *tax,* because it has not resorted to the "usual and ordinary" method of collection, viz., the creation of a lien upon property, or the seizure and sale of the property of the corporation. We have already pointed out that under Section 159 of the Act, the state has the power to obtain a decree and levy an execution, where the taxes are unpaid for two years. Again, provision is made for the collection of the tax by an action of debt, and upon the obtaining of a judgment the same may be collected by execution. But as shown in our opening brief (pp.

39-40) a tax is not a lien unless made so by statute. The failure of the legislature to make this particular tax a lien, or to provide for its collection by levy, does not change its nature as a tax. There are numerous methods adopted by the various legislatures to enforce the collection of taxes. The collection by an action at law is no more unusual than the collection by levy.

But the Bankruptcy Act does not grant priority merely to taxes that are liens.

In re Baker, 1 Am. Bank. Rep., 526, 529, it is said:

> "It is the opinion of the court *that even if the city had no statutory lien on the property of the bankrupt,* the claim for taxes has priority * * *."

In our opening brief (pp. 32-3) we referred to the definition adopted by this court in *Illinois Central Railroad* v. *Decatur,* 147 U. S., 190, 199, to the effect that

> "The word *'taxes'* means burdens, charges or impositions put or set upon persons or property for public uses."

Counsel for appellee characterize this definition as "highly untechnical" and say that the word "tax" has come, in a mistaken sense, to mean any charge exacted by the state, regardless of whether it is laid *in invitum,* or as the result of a bargain between the state and the citizen. It is contended that the present imposition is of the latter class, and that, therefore, it is not a tax. Upon this misconception the entire argument of appellee and the decision of the Court of Appeals rests.

In support of this contention, reference is made to *North Jersey City Ry. Co.* v. *Mayor of Jersey City*, 63 Atl., 833 (erroneously cited as 63 Atl., 83). That case, in fact, supports our position. There the question involved was as to the right of Jersey City to levy a *property* tax upon the right, privilege, license or franchise of the Street Railway Company to lay and maintain street railway tracks, and operate cars thereon. The Tax Act of 1903 provided for the taxation of all property not expressly exempted. All franchises and all property used for railroad purposes, etc., the *taxation* of which was provided for by any other law of the state, were exempted. The court said:

> "It is settled in this state that franchises are property (citing cases) * * *. The question, then, is whether the taxation of franchises is provided for by other legislation."

The Street Railway Company relied on the so-called "Voorhees Act" of 1900, which purported to tax the franchises of persons and corporations having the right to use or occupy the streets. It was contended by the city that the Voorhees Act was unconstitutional, but if constitutional that the percentage of gross receipts required to be assessed *was not a tax.* The objections to the validity of the act were (1) that a tax upon gross receipts is not a tax according to true value, as required by the Constitution, and (2) that the act attempts to provide two different methods of taxation for the property of the corporation, one by local assessors, according to its value, the other an arbitrary imposition by a state board. The court observed if the fran-

chise tax imposed is a *property* tax, that the first objection is fatal, and if not a property tax, the second objection is without force. The court said:

> "We think the tax on gross receipts is not a *property tax,* but a *license tax* imposed by the state as a condition precedent to the exercise of special privileges in the street * * * That the legislature did not intend the tax on gross receipts to be a property tax is indicated by the distinction made between property and franchises throughout the act."

The court then refers to the provisions of the act, and says:

> "We think it clear that the *franchise tax* was not intended to be a *property tax.* That impositions *of this character* (viz: franchise taxes) may be imposed by way of a license tax is well settled. *Such a tax* is imposed by this state upon the general franchise to be a corporation, and has been sustained by the courts. (Citing numerous cases.) The principle upon which such *taxes* are sustained is stated by Mr. Justice Field in *Home Ins. Co.* v. *New York,* 134 U. S., 594, and his language was approved by this court, in *Honduras Co.* v. *Board of Assessors* (54 N. J. L., 278), above cited."

The language of Mr. Justice Field referred to is as follows:

> "The granting of such right or privilege (of being a corporation) rests entirely in the discretion of the state, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the state each year or month, or a specific portion of its gross receipts, or of the profits of its business,

> or a sum to be ascertained in any convenient mode which it may prescribe. The validity *of the tax* can in no way be dependent upon the mode which the state may deem fit to adopt, in fixing the amount, for any year, which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows."

In that case the amount of a state tax was to be determined by the amount of capital stock and the annual dividends, and it was resisted on the ground that the capital was largely invested in United States bonds which could not be taxed by the state, but the tax was sustained on the principle above announced. The learned Justice further said:

> "*The tax* in the present case would not be affected if the nature of the property in which the whole capital stock is invested were changed and put into real property or bonds of New York or of other states. From the very nature of *the tax*, being laid upon a franchise given by the state, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested. The power of the state over the corporate franchise and the conditions upon which it shall be exercised, is as ample and plenary in the one case as in the other."

The New Jersey court continues thus:

> "The grant of the privilege to be a corporation rests in the discretion of the state, and may be made upon such terms as the legislature sees fit to impose. These terms are open to acceptance or rejection. In this respect the special franchise to use the streets does not differ essentially from the general franchise to be a corporation. It cannot be doubted that the legislature or a municipal

corporation vested with power to grant or refuse its consent to the special privilege to use the streets may grant the privilege on terms (citing cases). In such a case the imposition may be regarded as in the nature of rent or purchase price for the privilege; *but it may also be regarded as in the nature of a tax* subject to change by the legislature. In the *Lumberville Bridge Company* case the tax upon the franchise to be a corporation was imposed upon a corporation whose charter antedated the Act of 1846, making charters subject to alteration by the legislature. * * * *The tax* was sustained by this court. The same reasoning which justifies *the special tax* upon the corporate franchise justifies the special tax upon the special franchise to use the streets, although that special franchise may antedate the imposition of the tax."

The court concludes:

> *"It is, however, urged that if the franchise tax is the compensation exacted by the state for the exercise of the franchise,* IT IS NOT TAXATION *within the meaning of the exemption clause of the act of* 1903, *but rather in the nature of purchase price or rent. We think this contention also untenable. the exaction is called a franchise tax by the legislature, and the word taxation in the act of* 1903 *must be given the same meaning as the same word in the title of the act of* 1900. *Whether the use of the word by the legislature is strictly accurate is of no moment; the legislature had the right to call its exaction 'taxation.'"*

Then follows the language which counsel for appellee have set out on p. 20 of their brief, as follows:

> "As was said by the Court of Appeals of New York: 'Both in statutes and in judicial decisions the term "tax" is frequently used in a much more comprehensive sense than that which we have stated to be its accurate meaning. It is not used

> so broadly as to include the revenue from private property which the state or one of its political divisions may hold for emolument the same as other owners; but it certainly is used to comprehend exactions for the privilege of exercising franchise rights which latter are often, *especially in the case of foreign corporations*, merely the consideration received for privileges which the state is at liberty to grant or to withhold at pleasure.' *Heerwagen* v. *Cross-Town St. Ry. Co.*, 179 N. Y., 99, 71 N. E., 729."

This quotation was taken from the case of *Heerwagen* v. *Cross-Town Street Ry Co.*, 179 N. Y., 99, s. c. 71 N. E., 729. It is necessary to a proper understanding of the language quoted to refer briefly to the case from which it was taken. In that case an action was brought to recover the tax imposed upon a street railway company for its special franchise. The defendant claimed a deduction should be made on account of certain payments it had made to the municipality under an agreement to pay a certain percentage of its gross earnings. The tax act provided that there should be deducted from the amount of the franchise tax any sum paid to the municipality based upon a percentage of gross earnings, etc., which were *"in the nature of a tax."*

It was contended that the amounts paid to the city under the agreement in question were not "in the nature of a tax" and that no deduction should be made on account thereof.

The court said:

> "A tax has been defined as a forced contribution from a citizen to the state to be applied for governmental purposes. * * * The payments

> the defendants agreed to make were the consideration of the acquisition of valuable property rights which would survive its corporate existence and possess all the ordinary attributes of property. * * * The stipulated payments are really in the nature of rent or a rent charge. But granting all this, it seems to us manifest from the plain terms of the statute that these are the very payments which the legislature intended should be deducted from the amount of the special franchise tax."

Then follows the quotation set forth *supra*, p. 10.

The New York court therefore held that the payments in question were "in the nature of a tax" and that the company was entitled to credit therefor.

The court points out that many exactions are not taxes because they are not "forced contributions" levied by the state, but are more in the nature of rent which the state receives for the privilege of granting franchise rights. The court says that the word tax is so used *"especially in the case of foreign corporations."* We think we shall be able to show that the present franchise tax is not in the nature of rent for the privilege of corporate existence, and that that doctrine if applicable at all, applies only to *foreign corporations* seeking a license to do business in the state. There is a clear distinction between the payment of a *license fee* by a foreign corporation and the payment of a *franchise tax* by a domestic corporation. While in the former the imposition may or may not be a tax, in the latter it is always laid *in invitum*, and is necessarily a tax. But we shall later on recur to this subject more at length.

After quoting from the decision of the New York

court in *Heerwagen* v. *Cross Town Ry. Co., supra,* the New Jersey court concludes:

> "We think the franchises sought to be taxed by Jersey City are franchises, the *taxation* of which is provided for by another law, and that therefore they are not *taxable,* as property under the act of 1903. It was for the legislature to determine whether the tax imposed by the act of 1900 was a fair apportionment of the public burden without subjecting the prosecutors to a property tax upon the value of the franchise in addition. The *taxes* must be set aside."

The decision of the New Jersey court in the above case is a clear holding that the franchise tax *is a tax.* Otherwise the company would not have been entitled to exemption from the payment of property taxes under the general Tax Act of 1903.

Counsel for appellee also refer to the decision of this court in *People, ex rel. Metropolitan Street Railway Co.* v. *Tax Commissioners,* 199 U. S., 1, where the language of the New York court in *Heerwagen* v. *Cross-Town St. Ry. Co., supra,* is quoted. In that case and the succeeding case of *People, ex rel. Brooklyn City R. R. Co.* v. *Tax Commissioners,* 199 U. S., 48, the distinction between a franchise tax and the payment of the purchase price of a privilege or franchise, is clearly outlined. There it was contended that the provisions in certain grants or franchises, that the grantee shall pay something therefor, exempted the company from a tax on its franchises. This court held that the conditions upon which the franchises were granted were the purchase price of the grant, and that in the absence of an express

exemption the legislature was empowered to tax such franchises.

It was also claimed that the special franchise tax was void for the reason that it provided that certain annual payments made under existing contracts, should be deducted from the amount of tax levied, by reason of which deductions those who agreed to pay lump sums or annual sums less than the new tax for their franchises, were discriminated against.

The court answered this contention thus:

> "It may be observed that the lump sum is so obviously a payment for the franchise that it cannot be considered in any just sense as possessing the nature of a tax. It is not even rental. It is like money paid for a tract of land, part of the purchase price. It does not, like a percentage of the gross receipts, vary with the changes of business, has no resemblance to a continuing discharge of the obligation which property is under for contribution to the support of the Government."

In the present case the tax is paid as "a continuing discharge of the obligation which property is under for contribution to the support of the government." It is not paid as the consideration of the grant of the right to be a corporation. In fact the New Jersey statutes provide (Sec. 114, Dill's New Jersey Corporation Law, p. 138), that certain fees shall be paid by the corporators for the obtaining of a certificate of incorporation. The payment of these fees is the "consideration of the grant," and not the payment of the annual franchise tax.

Counsel for appellee say (p. 21), that a tax is a con-

tribution that is "demanded and required by the state, regardless of the consent of the citizen." They then add:

> "As the Circuit Court of Appeals said in its opinion,—'the State does not bargain with the subject, but commands,'—and in respect to a corporation the state does not *compel* a corporation to accept a charter, but in effect *bargains* with the incorporators to give them certain privileges or franchises, *in exchange for certain payments.*"

The complete answer to this contention is, as we have already pointed out, that the franchise tax is not the consideration of the grant to be a corporation. It is true that the state cannot compel a corporation to accept a charter and the incorporators in effect *bargain* with the state for the grant of a franchise, but the consideration of such grant is the fee paid in advance for the corporate privilege. The annual franchise tax cannot be the consideration, inasmuch as such tax must be paid by corporations organized previous to the passage of the act. Thus in *Lumberville Bridge Co.* v. *Assessors*, 55 N. J. L., 529, it is said:

> "The case of a corporation created by special act prior to 1884 * * * does not come under any different rule. The taxing act is general and the yearly fee provided by it falls as an incidental burden upon all miscellaneous corporations alike. * * *"

Again, as already shown in our opening brief, the legislature has the absolute power to increase or decrease the amount of the tax or abolish it entirely. The imposition therefore cannot be a contract between the corporators and the state for the reason that the liability is not fixed and determined

at the time the contract is made. But the courts of New Jersey have set this question at rest. Thus in *Lumberville Bridge Co.* v. *Assessors*, 55 N. J. L., 529, it is said that the tax in question is laid upon

"the right to exist in corporate form,"

and that

> "It is in short *a poll tax* levied upon domestic corporations for the right *to be.*"

And in *Pipe Line Co.* v. *Berry*, 52 N. J. L., 308, in discussing the question whether the tax law here under consideration was applicable to foreign corporations, the court said:

> "Mr. Justice Strong, in delivering the opinion of the court in *Railroad Company* v. *Georgia*, 98 U. S., 365, says: 'It is quite too narrow a definition of the word "franchise" to hold it as meaning the right to be a corporation. The word is generic covering *all* the rights granted by the legislature.'
>
> The act of 1884 requires all the enumerated corporations * * * to pay *an annual tax* for the use of the state by way of a license for their corporate franchises. The imposition *is not in compensation for the grant of the franchise by the state, but for the uses of the franchises in the state.*"

If therefore the tax "is not *in compensation for the grant* by the state, but for the uses of the franchises in the state" the contention that the franchise tax is a matter of bargain or contract between corporator and state, necessarily falls.

But irrespective of these considerations, there is a clear and well defined distinction between the imposition of a franchise tax upon a *domestic cor-*

poration, and the payment of a license fee by a *foreign corporation*, for the privilege of doing business in another state. This distinction while not always clearly defined, runs through the cases. It is clearly outlined in the recent decision of this court in *People of the State of New York* v. *State Board of Tax Commissioners*, 199 U. S., 1, *supra*, although in that case the point was only indirectly involved.

It is unnecessary, however, to review at length the numerous decisions of this court upon this subject. The cases of *Home Ins. Co.* v. *New York*, 134 U. S., 594, and the *Delaware Railroad Tax*, 18 Wall., 206, 231, fully illustrate the nature and character of the imposition levied by a state upon a *domestic corporation* in the form of a franchise tax. The character of the charge imposed by the state upon a *foreign corporation* in the form of a license fee, is discussed in the case of *Horn Silver Mining Co.* v. *New York*, 143 N. Y., 305. The distinction is also illustrated by the decision of this court in *Phila. Fire Ass'n* v. *New York*, 119 U. S., 110, where it is held that the state can discriminate between *foreign corporations* similarly situated.

Counsel for appellee in speaking of this franchise tax say (Brief, p. 23):

> "There is no difference between this form of exaction and the other form in such common use, whereby states cause *foreign* corporations to pay an annual license fee for the privilege of doing business in a different state, than the one of its creation. In such case the corporation may or may not avail itself of the *privilege*, but if it does, it contracts to pay certain stipulated amounts annually."

The same error, we submit, underlies the decision of the Court of Appeals. It says:

> "but the *tax* upon the estate is not to be confused with the *consideration* for the grant."

In his recent work on the "*Law of Foreign Corporations and Taxation of Corporations both Foreign and Domestic,*" Sec. 508, pp. 663 *et seq.*, Prof. Beale of Harvard says:

> "The *taxation* of the corporate franchise by the state which granted it can be restrained only by some provision of the state constitution * * *. The validity *of the tax* can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. * * * It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from *taxation.* As its revenues to meet its expenses are lessened in one direction, it may look to any other property as sources of revenue which is not exempted from *taxation.*"

The author then quotes from the decision of this court in the *Delaware Railroad Tax,* 18 Wall., 206, 231, as follows:

> " 'The state may impose *taxes* upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation, or its separate corporate property; and the manner in which its value shall be assessed, and the rate of *taxation,* however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of *taxation* might be adopted than the one prescribed by the legislature of the state. Our only concern is with the validity *of the tax.* All else lies beyond the domain of our jurisdiction.' It is true, as said by this court in *California* v. *Railroad Co.,* that the

taxation of a corporate franchise has no limitation but the discretion of the taxing power; and its value is not measured like that of property, but may be fixed at any sum that the legislature may choose. It may be *arbitrarily* laid, without any valuation put upon the franchise. If any hardship or oppression is created by the amount exacted, the remedy must be sought by appeal to the legislature of the state. * * *"

The author continues:

"This *tax,* when imposed upon a *foreign* corporation, is a privilege tax; *such as will be considered in the next section* (Sec. 509); when imposed upon a *domestic* corporation, it is in the nature of a *poll tax,* and in imposing a poll tax, the state which has jurisdiction of the person cannot be controlled." * * *

In *Lumberville Bridge Co.* v. *Assessors,* 55 N. J. L., 529, the present franchise tax is characterized as

"a *poll* tax, levied upon domestic corporations for the right to be."

The author continues:

"This tax is not a property tax, even when it is measured by the amount of property of a corporation. Therefore, to levy such a tax in addition to a property tax is not double taxation; and the tax is not subject to a constitutional requirement that taxes shall be uniform. * * *"

And in "the next section" (Sec. 509) the author says:

"A state may as has been seen tax any privilege it grants. Such a tax, *or rather license fee,* is the payment exacted of a *foreign corporation* for the privilege of doing business within the state. Since a foreign corporation may be allowed to do business in a state upon conditions, the payment of a sum of money may be made a condition; and

> this may in form be the payment of a tax greater than or different from that paid by a domestic corporation. Such a tax is valid. *It is not properly an exercise of the power to tax property, but is a license fee paid for the privilege of entering the state, and its validity* is a necessary deduction from the right absolutely to exclude the foreign corporation. Upon a similar principle the exaction of a fee for filing a certificate of incorporation is not a tax; nor is a fee for filing an annual report. * * *"

And in a subsequent section, in speaking of the right of a state to tax the franchise of a *foreign* corporation, Prof. Beale says:

> "Sec. 755. TAXATION OF FRANCHISE AS PROPERTY. But while permission to do the business of interstate commerce may not be taxed, the franchise of the corporation, regarded as property, may be taxed so far as it can be said to enter into the value of the property within the state, even if the corporation is engaged in interstate commerce, provided only it is not a franchise conferred by the United States. The distinction between a tax upon the *franchise* and a *license fee* to do business is certainly a shadowy one; but once the principle already considered* is established, that a foreign corporation may be taxed in a state, as upon its property actually there, upon its business capital, including franchise and good will, it follows that such a tax assessed upon the *franchise of a foreign corporation* engaged in interstate commerce is valid as a mere tax on property within the jurisdiction."

As observed by the distinguished author, the distinction between a license fee and a franchise tax *in the case of a foreign corporation is,* at best "a shadowy one," but aside from the present contro-

Supra, Sec. 507.

versy, we know of no decision (other than that of District Judge McPherson in the Danville Rolling Mill Co. case, 121 Fed., 432) where an annual franchise tax levied upon a *domestic* corporation has been held to be other than a tax. As we have before said and repeat now, a franchise tax lacks every element of a contract obligation; it applies to corporations organized before the passage of the taxing act; it is not a subject-matter of bargain between the state and the corporation; it is not the *consideration* of the grant as are other exactions paid before the issuance of the charter, and it is laid *in invitum*, and for the purpose of raising revenue. These and other considerations not necessary to be repeated, completely demonstrate the exaction to be *a tax*, and not the purchase price of corporate existence, as contended by appellee.

It is next urged that the charge is not a tax because it is declared by the Act to be a *debt*, and that as the state is placed on an equal plane with other general creditors, no tax can be created in the nature of things.

To paraphrase the argument:

> "A tax is not a debt, therefore a *tax* which is declared to be a debt is not a tax."

The two premises are clearly inconsistent, as the first assumes that the tax is not a debt, and the second states that when a *tax is a debt*, it is not a tax. If a tax cannot be a debt, the second premise which states that a tax *is* a debt, proves the first to be false. While, as a general rule, it is true that a tax is not a debt, in the sense that a debt is the creation of contract, the rule is not applicable where, as in the present case, the tax is expressly declared to be a debt by

statute. The statute takes the tax out of the general rule that a tax is not a debt, as that rule only applies in the absence of a statute.

The New Jersey Act provides (Sec. 153)

> "Such *tax*, when determined, shall be a debt from such company to the state, for which an action at law may be maintained * * *."

It will be noticed that the tax in question is only made a debt *for the purpose of collection,* and not otherwise.

The fallacy of their position is clearly shown by the case of *Meriwether* v. *Garrett*, 102 U. S., 472, cited by counsel in support of their argument to the effect that a tax is not a debt. But in citing this case, counsel fail to refer to the fact that in that very case, it was held that where a tax is declared to be a debt, for the purpose of collection, as in the present case, its character as a tax is not thereby changed. It is there said (pp. 513-14):

> "Taxes are not debts. It was so held by this court in the case of *Oregon* v. *Lane County*, reported in 7th Wallace. Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum. Nor is their nature affected by the fact that in some states—and we believe in Tennessee—an action of debt may be instituted for their recovery. The form of procedure cannot change their character.*"

And see Vol. 9 Rose's Notes, p. 1106, and cases cited. To the same effect, see *Danforth* v. *McCook County* (S. D.), 26 N. W., 940. And in the present case the

section of the New Jersey statute, above quoted, which declares the tax to be a debt, etc., we repeat refers solely to procedure. It provides that

> "* shall be a debt * * * *for which* an action at law may be maintained * * *."

The decisions above cited show conclusively that this section does not in any way affect the character of the tax as such. It is still a tax no matter by what name it is called, nor what it is declared to be. There is no reason why a tax should not be declared to be a debt for the purpose of collection, *or even generally*, and yet retain the characteristics of a tax. The cases cited by counsel are cases where no statute existed declaring the tax to be a debt. Of course, a tax is not a debt in its strictest sense, as a debt is usually founded on contract. But a tax is a debt in the sense that it is an obligation due the state.

On pages 24-25 of their brief appellee quotes at length from the case of *American Smelting & Refining Co.* v. *People*, 82 Pac., 531 (Colo. 1905). That case merely holds that the fee paid in advance by a *foreign* corporation for the privilege of doing business in a state is not a tax, but as the court there observed, it was "the purchase price or bonus" for the privilege of doing business in the foreign state. But the court also held that the *annual franchise tax* similar to the New Jersey tax, *is a tax*, saying (p. 533):

> "The contention that section 65 is invalid, because the thing imposed is in the nature of a license under the police power, *and not a tax* under the sovereign power of taxation, and therefore not within the title of the Act, which is 'An Act in relation to public revenue,' cannot be upheld.

> That which is levied here is not for regulation, nor is it traceable to the police power of the state, but finds its sanction *in the taxing power*, and, while called a 'state license tax,' it is, as already decided, a *business tax*, laid for the purpose of procuring revenue for state purposes, and therefore the provision is clearly within the title."

And throughout the case the annual charge is referred to as a tax. In fact, the only difficulty the court seemed to have had in classifying the nature of the charge, was whether it was a franchise, excise or business tax, or a property tax.

It is next urged that the fact that the imposition is called a tax in the Act, and in the decisions thereunder, does not determine its character. We do not contend that the designation of the charge as a tax absolutely determines its character. But we believe where the charge possesses the essential elements of a tax, that its designation as such by the legislature is very persuasive.

Thus, in the recent work of Gray on Limitations of Taxing Power, p. 42, it is stated:

> "The statutory designation, while not absolutely controlling, is generally an important element in determining what kind of tax the statute imposes."

Counsel for appellee then state that the decisions of the courts of New Jersey, cited in our opening brief, pp. 11-17, do not decide that the franchise tax in question is a tax. Those cases are referred to at length in our opening brief, and, as they speak for themselves, it is unnecessary to again review them here. Many of them are cited for the purpose of showing that the courts of New Jersey have, at all

times, designated the franchise tax, as a tax, whenever the question has come before them.

Reliance is also placed on the decision of District Judge McPherson *In re Danville Rolling Mill Co.*, 121 Fed., 432, where the present franchise tax was held not to be a tax within the meaning of the Bankruptcy Law. That decision is based solely on the Car Company decision, and if that furnishes no support, the case as an authority fails. Irrespective of the decision of the lower courts in the case at bar the Danville Rolling Mill case is the only one in the books which denies priority under the Bankruptcy law to the present tax. Claims for franchise taxes have been presented by the State of New Jersey in numerous cases, but until the decision in the Rolling Mill case, the right to priority was never questioned. In fact, after the decision in that case, the State of New Jersey prayed an appeal to the United States Circuit Court of Appeals, but this was rendered futile by reason of the fact that the trustee in bankruptcy with the permission of the court paid the franchise taxes in full.

Reliance is also placed on *In Re Ott*, 2 Am. Bank. Rep., 637. In that case it was held that a mulct tax levied by the State of Iowa for the privilege of selling liquors, was not entitled to preference as a tax, because the Supreme Court of Iowa had theretofore held that such mulct tax was *not a tax*. If the Supreme Court of New Jersey had held that the present franchise tax was not a tax there might possibly be a different question here.

Appellee places special reliance upon the Ott case, however, for the reason that the mulct tax was given

the same lien as other state taxes. By turning to the report of the case (p. 638) it will be found that *the bankrupt did not own the premises upon which the tax was a lien,* but that they were owned by one Gradient.

Counsel ineffectually attempt to distinguish the Singer case by the statement that the question as to whether the franchise tax was a tax was not before the court. We refer to this case at length in our opening brief on pp. 15 *et seq.* A reading of the case will readily show that the question was squarely presented and as squarely decided. The case is on "all fours" with the one at bar, and we are content to rest the present case upon that decision. It is contended, however, that it was unnecessary to pass upon the question whether the charge was a tax, inasmuch as the decision of the court in the second Singer case (62 N. J. L. 289) was placed upon the ground that the court's former adjudication in the first Singer case (58 N. J. L., 634) was binding on it. An examination of the Singer case will readily demonstrate that the decision was placed upon both grounds. The fact that the decision might have safely been placed upon one of such grounds does not render the language of the court upon the other point *obiter dictum.* Counsel say that the Singer case when carefully considered and analyzed, furnishes but small comfort to appellant, especially when read in the light of the separate opinion of Judge Vredenburg, holding that the imposition was "*in a manner a tax.*"

This innuendo is for the purpose doubtless of creating the impression that Judge Vredenburg did

not concur in the holding of the majority that the imposition was a tax. Upon turning to the opinion of that judge it appears that no such language was used, though in the brief of counsel the language is quoted and italicized. The court itself did say, however, that:

> "The exaction annually of this license fee * * * though not in form a tax upon the property * * * is in fact a burden upon the annual earnings of that property * * * and thus falling on them, is in a manner * * * a tax *upon that property.*"

Counsel for appellee on pp. 41-43 of their brief have quoted (with apparent approval) from the briefs filed on behalf of the State of New Jersey in the Singer case, in which it was argued by the state that license fees were not included in the term "tax." The complete answer to this suggestion is that the highest court of New Jersey did not agree with the then contention of the taxing authorities of the state, but squarely held that the imposition was a tax, and therefore within the exemption clause of the Singer Company's charter. We do not understand that appellee contends that the State of New Jersey is now estopped from relying on the decision of her highest court that the charge in question is a tax, because of the fact that the state originally contended that it was a mere license fee. The fact that the state did so contend, *and that the contention was not sustained,* disproves the assertion of appellee that the question here involved was not decided in the Singer case.

The Car Company case is sufficiently referred to on pages 19 *et seq.* of our opening brief.

In this connection it may be noted that the scope of

the Car Company decision is evidenced by the later decision in *King* v. *American Elec. Veh. Co.* (N. J., Dec. 12, 1905), 62 Atl. Rep., 381. There it was contended inasmuch as the corporation was insolvent and all of the property of the corporation had been turned into cash by the receiver, that it should not pay a franchise tax *thereafter* assessed. The court overruled this contention and said:

> "It has been determined by our Court of Errors and Appeals that the assessment to be made against the franchise of a company incorporated under the laws of this state is an arbitrary imposition laid without regard to the value of its property, or its franchises, or whether it exercises the latter or not, and is imposed solely as a condition of its continued existence, and that without regard to solvency or insolvency. *In re U. S. Car Co.*, 60 N. J. Eq., 514, 43 Atl., 673."

In our opening brief (pp. 27-8), we cited *Myers* v. *Campbell*, 64 N. J. L., 186, where the Singer case is cited approvingly. Counsel say that this is "a totally misleading statement as the Singer case was cited on a different point." The only purpose of the citation as we *then* stated in our opening brief was to show "That the Car Co. case is not regarded as departing from the Singer Co. case." In the Singer case the court squarely holds that the franchise tax is a tax. Appellee claims that in the Car Company case decided eight months later than the Singer case, which decision was concurred in by the same justices who decided the Singer case, the court decided that the impositon was not a tax. In the Car Company case the Singer case is not referred to. If the Car Company case holds, as counsel for appellee claim, it can only be upon

the theory that the Singer case is overruled upon this particular point. The fact, therefore, that the Singer case is referred to in the case of *Myers* v. *Campbell, supra, subsequent* to the Car Company decision, demonstrates that the doctrine of the Singer case is still unchanged and unmodified.

The case of *New Jersey Street Ry. Co.* v. *Mayor of Jersey City*, 63 Atl., 833 (erroneously cited 63 Atl., 83), relied on by appellee (their brief, p. 47) as holding that the imposition is not a tax, is distinguished on pages 7, *et seq., supra*. The case does not so hold. In fact, as already pointed out, it holds that the charge is a tax. The court said (p. 834):

> "The grant of the privilege to be a corporation rests in the discretion of the state, and may be made upon such terms as the legislature sees fit to impose. Those terms are open to acceptance or rejection. In this respect, the special franchise to use the streets does not differ essentially from the general franchise to be a corporation."

From this language counsel for appellee draw the conclusion that the franchise tax is a contract obligation, and not a tax. They say:

> "The offer and acceptance, with the payment of a consideration, are the indicia of contract, not of tax."

The court did not announce any such doctrine. An examination of the case discloses that at the conclusion of the opinion the court holds that the franchise tax is a tax thus:

> *"It is, however, urged that if the franchise tax is the compensation exacted by the state for the exercise of the franchise, it is not taxation within the meaning of the exemption clause of the act of* 1903, *but rather in the nature of purchase price or*

> *rent. We think this contention also untenable. The exaction is called a franchise tax by the legislature, and the word taxation in the act of* 1903 *must be given the same meaning as the same word in the title of the act of* 1900."

Counsel for appellee then say (their brief, p. 49) that the payment of a franchise tax is the consideration for the grant of a charter, and that in some states this consideration is payable in a lump sum, while in New Jersey it is payable in annual installments. We have already pointed out (*supra*, p. 14) that the incorporators of a New Jersey Company are obliged to pay a lump sum in advance for the issuance of a charter. The annual license fee cannot therefore be considered as the purchase price of the grant, inasmuch as that consideration is payable in advance before the issuance of the charter. This view is confirmed by the fact that the franchise tax law is applicable to corporations organized before the passage of the law.

Counsel conclude their argument upon this point with the contention that the Federal Courts are not bound to follow the decisions of the courts of New Jersey as to what constitutes a tax. They say:

> "Even if the legislature of the state had declared the charge to be a tax, and the courts of the state in construing it had agreed therein mistakenly, the United States bankruptcy courts would not be obliged to follow such error."

In our opening brief (pp. 29-30) we answered this contention.

In addition to the cases there cited, the following additional authorities may be noted:

In re Stalker, 123 Fed., 961 (Dist. Ct. W. D. New York), the court in allowing priority to a special assessment said:

"The point that the word 'tax,' as used in the section under consideration, does not include assessments levied for local improvements, is not maintainable. It is perfectly true that well-recognized distinctions exist between the word 'tax' and 'assessment.' * * * This question is broad, and might be of much difficulty, were it not that the interpretation adopted by the highest tribunal of the state must govern here. It is an established rule in the courts of the United States that the decisions of the state courts with regard to the law of real estate, construction of state constitutions and statutes, are authoritative rules of what the law is."

Citing *Burgess* v. *Seligman*, 107 U. S., 33, and other cases.

In *First National Bank* v. *Aultman, Miller & Co.*, 12 Am. Bank Rep., 12, it is said:

"In determining what is a tax in the respective states, the bankruptcy courts look to the laws and decisions of such states. When either the statute law or the decisions of the courts of the state say that a certain charge or imposition is a tax, the bankruptcy court will require the trustee to pay the same when it is legally due and owing by the bankrupt."

In matter of Mutual Mercantile Agency, 8 Am. Bank. Rep., 435, it is said:

"Following the principle of the *Ott case*, that the construction given by the state court to the state exemption laws should be followed by the Federal courts, we must consult the law, not of Iowa, but of the state of New Jersey, in deciding the case under consideration."

See also:

In re Danville Rolling Mill Co., 121 Fed., 432, S. C., 10 Am. Bank. Rep., 327.

In re Camp, 1 Am. Bank. Rep., 165.

This decision was affirmed by Judge Wing on January 9, 1905.

And in matter of *Emmerman* v. *Ohio Steel & Iron Specialty Co.* (U. S. Dist. Ct., N. Dist. of Ohio), 13 Am. Bank. Rep., 39, the referee said:

> "The Bankruptcy Act does not make any distinction as to the character of the tax which is imposed."

This decision was also affirmed by Judge Wing on January 9, 1905.

And in Brandenburg on Bankruptcy (3rd Ed.), p. 646, it is said:

> "A license fee or franchise tax has been held to be entitled to priority of payment." (Citing cases.)

But even if we assume that the Car Company case decides all that appellee claims for it, and that no part of its language is *dictum*, yet that case does not decide that the charge *is not a tax.* The language of the case is that it *"is not a tax upon corporate franchises,"* and that "in fact, it is not, *strictly speaking,* a tax at all."

As already shown, the statement of the court that it was not "strictly speaking" a tax, was made in the light of the prior decisions (*Standard Cable Co.* v. *Attorney General,* 46 N. J. E., 270, *Hancock* v. *Singer Mfg. Co.,* 62 N. J. L., 289) to the effect that it was not a *property* tax, and therefore not within the scope of Article 4, Section 7, paragraph 12 of the New Jersey Constitution, which provides

> "that *property* shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

But, assuming further, for the purpose of this argu-

ment, that the court did hold that it is not *strictly speaking* a tax, it is still a tax in the sense in which that word is used in Sec. 64a. In other words, that section is not limited to "strict" taxes, but it applies to *all* taxes by whatever name they are called. And in this sense it would also include license fees or taxes which are paid *in advance,* either by a domestic corporation, for the privilege of existence, or by a foreign corporation for the privilege of doing business. In fact, throughout the opinions of this court, wherever reference is made to the subject, the license fee paid by a foreign corporation is described as *a tax upon the privilege of doing business.* We submit that whether this court takes the view that the charge is a franchise tax or an impost as held in the Singer case, or an "arbitrary imposition" within the meaning of the Car Company case or a "poll tax" as held in *Lumberville Bridge Co.* v. *Assessors,* 55 N. J. L., 529, is wholly immaterial, as in any event the charge is entitled to priority under the express terms of Sec. 64a, and we urge that even if the court should find itself unable to reconcile the Singer and Car Company cases, that reference should be made to the earlier and later New Jersey decisions wherein the charge is denominated as a tax, as in *Lumberville Bridge Co.* v. *Assessors, supra,* where the court describes the charge as

> "*A poll tax,* levied upon *domestic* corporations for the right to be."

II.

THE AMOUNT OF THE 1902 TAX.

It is sought to justify the action of the referee in reducing the amount of the 1902 tax upon the ground (1st) that the Bankruptcy Act (Sec. 64a) permits the court to determine the amount and legality of the tax and (2nd) that inasmuch as the liability arises out of contract the courts are authorized to look to the contract as the measure of liability. We have discussed this subject at length on pp. 40-43 of our opening brief, and it is necessary to add but little here. We believe that it is clear upon both principle and authority, that the action of the assessors is not subject to collateral attack, and that this rule is not changed by the provisions of Section 64a. It is probably true if the bankrupt had complied with the law and made a report as to its outstanding capital stock, that the assessment would have been but $4,250. But in the absence of such a report, the assessors, in compliance with the law, made the assessment from the best information obtainable. In such a case the assessment is conclusive, unless assailed in a *direct* proceeding. That course was open to appellee, but he neglected to avail himself of it.

The question is squarely decided in the recent case of *King* v. *American Electric Vehicle Co.*, 62 Atl., 381, decided Dec. 12, 1905. There the defendant company was organized in New Jersey as a manufacturing company. At least 50 per cent. of its stock was invested in manufacturing within the state and its capital stock

was therefore exempt. From 1899 to 1902 it made a proper return to the assessors, and no tax was assessed. In September, 1902, the company was adjudged insolvent and a receiver was appointed. In 1903 the assessors, in the absence of a return, made an assessment on the stock of the corporation, and the state made a demand on the receiver therefor. As in the case at bar, no appeal was taken by the receiver or the corporation. The claim was made there as here, that the assets were insufficient to pay the creditors, and that the claim for taxes should therefore be disallowed, etc.

The court said:

> "The claim which the receiver now makes on behalf of the creditors of this insolvent corporation is that, as it was a manufacturing corporation, the assessment would not have been made if a proper return of the character of the business of the corporation, and the fact of its insolvency, had been made to the state board; that the policy of the lawmaking power of the state is in favor of fostering manufacturing companies; and that the omission to make the return, upon which the state board allows the exemption, should not be permitted to overthrow this beneficent policy. With a desire to give effect to this liberal intention, I have sought for some logical reason upon which to rest a conclusion favorable to the claim of the petitioner, but have not been able to do so."

The court then sets out the provisions of the law and continues:

> "It has been determined by our Court of Errors and Appeals that the assessment to be made against the franchise of a company incorporated under the laws of this state is an arbitrary imposition laid without regard to the value of its property, or its franchises, or whether it exercises the latter or not, and is imposed solely as a condition

of its continued existence, and that without regard to solvency or insolvency. *In re U. S. Car Co.*, 60 N. J. Eq., 514, 43 Atl., 673. The defendant company had a corporate existence in 1903, it made no return and took no steps to put itself in a position to have the benefit of the proviso contained in the act of 1901, and, so far as the state board of assessors had knowledge, it fell within the class described in the act as 'all corporations incorporated under the laws of this state.' "

And the court concluded:

"As in the U. S. Car Company case, *supra*, it was held that neither the levying of the assessment after the appointment of the receiver, nor the fact of insolvency, in any way affected the right of the state to the franchise tax so long as the company continued in existence, and as it has also been determined in *Hardin* v. *Morgan et al., supra*, that the making of the return is a pre-requisite to exemption, I am of the opinion that the cases last cited must control the one under consideration, and that, as this corporation was subject to a franchise tax or license fee unless it made the return required by law, the assessment was properly levied, and the receiver will be so advised."

The cases cited by counsel for appellee on pp. 56-57 of their brief to the effect that the assessment can only be levied on stock actually issued and outstanding, are all cases where the assessment was attacked in a direct *proceeding by certiorari.*

III.

THE ASSESSMENT FOR 1902 WAS NOT VOID.

It is contended that the claim for 1902 should be denied priority for the reason that the assessors did not make a report of the assessment on or before the first Monday in June, as prescribed by the statute. This contention was advanced in the briefs filed in the Court of Appeals. The court there said:

> "Whether, as appellee urges, the court erred in allowing any sum whatever for 1902, cannot be reviewed, *as no cross appeal was taken.*"

Counsel do not now dispute this proposition, but say that if the claim should not have originally been allowed, it should not now be given priority, even though the appellee is not now in a position to complain of such allowance. It would seem that the mere statement of such a proposition furnishes its answer.

But irrespective of this consideration, a reading of the law demonstrates that the levying of the tax is not conditioned upon the making of the report. The act (Sec. 150) provides that the corporation *shall pay* an annual license fee. Section 152 provides that the assessors shall certify to the comptroller on or before the first Monday in June a statement *of the basis* of the franchise tax, which shall thereupon become due and payable, etc. The making of this report does not in any way affect the validity of the tax. It merely fixes the time when the assessment is to become due and payable. Again, it is well settled that the time in which an assessment is made is merely directory, and if an assessment is made at a later date, its validity is in

no way affected, unless the right of third parties intervene.

Wheeler v. *City,* 24 Ill., 105.
Easton v. *Savery,* 44 Iowa, 654.
Pond v. *Negus,* 3 Mass., 230.
Desty on Taxation, p. 519.

Thus in Vol. 1 Cooley on Taxation (3rd ed.), p. 487, it is said:

> "So in general the fixing of an exact time for the doing of an act is only directory where it is not fixed for the purpose of giving him a hearing, or for any other purpose important to him."

And in the present law the making of the report on or before the first Monday in June is merely directory. It was never the intention of the legislature to place it in the power of the Board of Assessors, who are charged with the performance of merely ministerial duties, to nullify the tax laws of the state by a failure to make a report within the time fixed. After the expiration of such time the assessors could be compelled by mandamus to make the report.

Counsel for appellee cite the case of *Beard* v. *Board of Supervisors,* 51 Miss., 542, as holding a *contra* doctrine. The case is not in point. There the board was mandamused to levy a tax for school purposes. The board made a return that they could not levy the tax for the reason that they had not received the report from the county superintendent, as to the needs and requirements of the schools. The court said:

> "The report and estimates of the superintendent are necessary data to fix the *rate* of assessment. If, therefore, the board were not advised, in the mode prescribed, of a deficit, and its amount,

they could not be chargeable with the neglect of duty complained of."

The court did hold, also, that the legislature intended that the taxes should be imposed at the July session. The reason of this was that the board was limited to a total tax of $25 on every $1,000 *for all purposes.* The court observed:

> "The law does not mean that the board shall, in its discretion, make a levy of taxes for one purpose at one session, and for another at another session, but the injunction is plain that the especial business at the July session shall be to consider the subject of county finances—the demands upon the taxing power, *so to adjust the rate of taxation* within the limits fixed by law, as that all legitimate objects shall be provided for. The act of 1873 contemplates no departure from this general rule, for the latest day allowed the county superintendent to make his estimate for school purposes is the first day of July, so that all that is necessary to be known by the board, in reference to the needs of the public schools, must be before it at the session in July, or if that fails, then at the called session provided for in section 1373."

Reference is also made to *Wiley* v. *Flournoy*, 30 Ark., 609. That case merely held that the clerk and county judge who with the assessor constituted the County Board of Equalization, had no authority under the revenue law to change the valuation of land, as returned by the assessor, after the adjournment of the Board of Equalization. There the act expressly limited the session of the board to six days, and the change in the assessment was made after adjournment, in private, at the residence of the county judge, and by only two members of the board.

The next case cited is *Mix* v. *People,* 72 Ill., 241. In

that case it was held that the statutory provision which required the various local authorities to certify to the county clerk the several amounts which they required to be raised by taxation, was mandatory. The court held that if such report could be filed at any time, the local officers would

> "have it in their power to hinder, delay and obstruct the collection of the entire revenue, by their negligence or incompetency."

And the court said:

> "Such a power to obstruct the collection of all taxes, in the municipality making such a levy, cannot exist, nor was it intended that it should."

A number of other reasons are set forth in the opinion, showing that the provision there in question was mandatory, but it is unnecessary to further refer to them.

Reference is also made to *Cogill* v. *Lang*, 50 Ill., 202. We presume counsel refer to *Cowgill* v. *Long*, 15 Ill., 202. This case is to the same effect as that of *Mix* v. *People, supra.*

Counsel say if the assessors *can* make their report at any time after July 1st, that the corporation will be deprived of the right of appeal provided for by Section 162. That section provides, however, that such appeal may be taken "within three months *from the date of assessment.*" If the assessment is not made until November, the time for appeal will not commence until November. The requirement that interest must be paid must receive the same construction. The interest is not payable until the tax is due. The Act (Sec. 152) provides for the making

of a report by the assessors of the amount of the tax and that such tax shall "*thereupon*" become due and payable. The Act also provides that

> "If the tax * * * remains unpaid on the first day of July, *after the same becomes due*," it shall bear interest, etc. It is clear that if the tax is not assessed it is not due, and if it is not due, it bears no interest.

But in any event the corporation cannot attack the validity of the tax in this collateral proceeding. (Opening brief, pp. 42-3.)

IV.

THE LICENSE FEE IS A TAX WITHIN THE MEANING OF SECTION 64A.

Under this head it is argued that under section 64a only the taxes of a *certain or particular state* are entitled to priority, and not the taxes of all the states.

Section 64a provides:

> "The court shall order the trustee to pay *all* taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality," etc.

It is argued that the grammatical construction of this section requires the insertion of the word "the" before the words "State," "county," etc., and that only taxes due to "the state," to "the county," etc., are entitled to priority. The same contention was unsuccessfully made in the Court of Appeals. In that court the difficulty presented itself to appellee as to what "certain or particular state" Congress intended

to favor. Counsel thus solved the problem, to use their own language.

> "*The only reasonable conclusion* from the language of this section seems to be *the state in which the bankrupt has property from which the taxes can be collected.*"

Counsel now say (their brief, pp. 63-64):

> "If the question were asked *which* state, *which* county, or *which* district is meant, the FIRST AND MOST APPARENT ANSWER WOULD BE, *the state in which the bankruptcy proceedings are pending.*"

And yet on page 68 of their brief counsel say:

> "Had Congress intended to favor only the state in which the proceedings were pending it would have used the language of the Act of 1867."

Counsel abandon "*the only reasonable conclusion*" and adopt "*the first and most apparent*" one.

The reason counsel now assign for favoring the state where the proceedings are pending is that

> "it is there that the bankrupt usually has the bulk of his property—and it is there that the enforcement of the tax claim could be most easily made by law, seizure and sale of the property of the bankrupt."

Suppose the bankrupt has property in more than one state. What reason is there for giving priority to a single state, or why should preference be given to the taxes levied on the "bulk" of the bankrupt's property, and not on all of it, wherever it is situated: Suppose the bulk of the property is not in the state where the bankruptcy proceedings are pending?

Reference is made by way of comparison to the Bankruptcy Act of 1867. That act expressly provided (Clause 3):

> "All debts due to the state *in which the proceedings in bankruptcy are pending*, and all taxes and assessments made under the laws of such state"

shall be entitled to priority.

Clause 5 provided that:

> "Nothing contained in this act shall interfere with the assessment and collection of taxes by * * * *any state.*"

Counsel then cite *In re Ambler*, Fed Cas. 271; s. c. 8, Ben. 176, a decision under the Act of 1867.

The court there said:

> "But the only priority and preference in the distribution of the assets of the estate in bankruptcy of the bankrupt, given by the section in question of the statute, to taxes due to a state, is the priority and preference given by the *third* subdivision of the section, to taxes and assessments made under the laws of the state *in which the proceedings in bankruptcy are pending.*"

We fail to see the pertinency of the citation. But counsel say (their brief, p. 65):

> "* * * that Congress intended to grant the right of priority to such states only who (*sic*), independently of bankruptcy proceedings, *could have actually collected the tax in question from property situated within the boundaries of such state.*"

This is a change of front from the position taken by counsel in their brief (pp. 63-4), where they contend that it was the intention of Congress to allow tax priority *only to the state in which the bankruptcy proceedings are pending.* The contention now made can only mean that Section 64a of the Bankruptcy Act of 1898 applies only to *property* taxes. There is nothing in the

law upon which any such claim can rest nor is there any authority in support of it.

In the matter of the Mutual Mercantile Agency, 8 Am. Bank. Rep., pp. 435, 437, it is said:

> "There is nothing in the Bankruptcy Act to suggest an intention of Congress in the use of the word 'tax' to limit the meaning to any particular kind of tax."

The contention is also answered by the recent case of *City of Waco* v. *Bryan,* 127 Fed., 79 (C. C. A., 5th Cir.), There the City of Waco made proof of a debt for taxes due to it, and asked for priority of payment. The referee and the District Court denied the claim on the ground that the property upon which the taxes were assessed did not come into the hands of the trustee. The Court of Appeals reversed the judgment and said:

> "It is not disputed by anything we find in the transcript that the said taxes are legally due and owing by the bankrupt to the City of Waco, *irrespective of any lien for taxes on the property assessed.* * * *"
>
> "*This section* (64a) *is perfectly plain,* and seems to admit of very little, if any, construction. It is contended that it is inequitable for the bankrupt's estate to be compelled to pay by priority taxes originally levied on property which does not come into the hands of the trustee. To this it is sufficient answer to say that the priority to be given payment of claims against the bankrupt *is within the control of the lawmaker, and is absolutely fixed by the statute, and the rule therein declared cannot be varied to meet ideas of what equity and good conscience may require.*"

The court refers to the provisions of the prior Bankruptcy Acts and continues:

"The present bankruptcy law gives priority for *all* taxes legally due and owing by the bankrupt to the United States, the state, county, district, or municipality, in advance of the payment of dividends to creditors. In short, it puts taxes due the state, counties, and municipalities upon the same footing as taxes due the United States. On the plain construction of Section 64a of the present law, and particularly in the light of past legislation on the subject, there is no room to hold that it makes any difference whatever, as to the right of priority, whether property on which taxes were assessed ever came into the hands of the trustee. The test is given in the statute: Are the taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality claiming the same? If yea, they are entitled to be paid in advance of the payment of dividends to creditors, for thus saith the law."

Judge Shelby dissented, but upon a different ground.

In *City of Chattanooga* v. *Hill,* 139 Fed., 600 (C. C. A. 6th Cir.), the State of Tennessee, the County of Hamilton, and the City of Chattanooga sought an order to require the trustee to pay certain taxes assessed against the real and personal property of the bankrupt. Eighty-five per cent. of the property being heavily mortgaged was surrendered to the mortgage creditors. The unmortgaged property that came into the hands of the trustee represented but 15 per cent. of the property upon which the tax was assessed, and the court ordered the trustee to pay but 15 per cent. of the taxes. The Court of Appeals in reversing this judgment, said:

"*There seems to be no room for construction.* The taxes claimed are confessedly due and owing. Of the aggregate tax claimed $450 was assessed against the aggregate value of the personal prop-

> erty owned by the bankrupt and the remainder upon the aggregate value of the realty. Under the Tennessee statute this assessment constituted a first charge or lien upon the fee in said property, regardless of liens or divisions of interest * * * But, *irrespective of the question of a lien,* the taxes constituted a personal debt against the taxpayer which can be enforced by proceedings *in personam.* The bankrupt says that 'all taxes legally due and owing by the bankrupt' shall be paid by the trustee 'in advance of the payment of dividends to creditors.' This does not say or mean that such payment shall be dependent upon the question as to whether they are a secured debt. * * * Congress evidently meant that the sovereign should neither be postponed nor delayed in the collection of taxes, and therefore provided that the trustee should pay all taxes due and owing by the bankrupt in advance of dividends. The bankrupt might have paid all taxes immediately prior to the filing of a petition by or against him. This would not have been a preference. The law means that the trustee shall do what the bankrupt might have done and what good citizenship required him to do."

And in the present case the bankrupt might have paid the franchise taxes and its act would never have been called in question.

And *In re Baker,* 1 Am. Bank. Rep., 526, 529, it is said:

> "It is the opinion of the court that *even if the city had no statutory lien* on the property of the bankrupt the claim for taxes has priority and should be paid out of the proceeds of the property which is under the state law subjected to the payment of the debts of the bankrupt."

Counsel take the tack that it is the tax of *the* state and not the taxes *of any state or of all states that* are

entitled to priority. To support this last proposition they rely upon a supposed legislative intention to restrict the preference to a particular state.

This so-called intention counsel endeavor to ascertain by reference to the action of the Senate on the various bills relating to bankruptcy, introduced previous to the passage of the present law. Let us follow counsel in their reasoning. The original bill in the Senate was known as the "Torrey Bill." This bill gave priority to *debts* due a state, to the extent only that such *debts* constituted a lien on the property of the bankrupt. In place of this bill the Senate substituted what was known as the "Nelson Bill," which gave priority to "taxes due *any* state or territory or the District of Columbia." Congress then adjourned, and at its next session, passed the present law known as the "Henderson Bill," which was reported by the House. From these proceedings counsel draw the conclusion that Congress did not intend to give preference to the taxes of all the states, but only of a particular state, because of the fact that they did not pass the bill which expressly gave preference to the taxes of *any* state. If there were no other provisions in the Bankruptcy Law than those relating to the priority of taxes, there might be a semblance of logic in the contention. The law, however, contains seventy sections relating to as many different subjects. Counsel ask this court to hold because the Senate did not pass the Torrey Bill, which gave preference only to *debts* that were a lien, or because the Senate failed to pass the Nelson Bill, which gave preference to the taxes of *any* state, that Congress intended that preference should not be

given to the taxes of every state. Is there anything to show that the Torrey or the Nelson bills did not become law on account of the provisions referred to? Does it anywhere appear that the differences in phraseology in the various bills were even the subject of discussion or that the bill which became a law, became so because of a supposed restriction on tax priority? If the Henderson bill passed solely because it restricted tax priority to a single state, it would have been much easier to strike out the word "any" before the word "state" in the Nelson Bill and pass that bill as thus amended, or to substitute Section 64a of the present law in place of Section 65a in the Torrey Bill. Again, the action *of the Senate* is not the action of Congress. The views of the Senate, if those views were evidenced by the rejection of the Torrey and Nelson bills, may not have been the views of the House, or of the President. Yet counsel contend that by the adoption of the Henderson Bill, Congress recorded an explicit refusal to give preference to the taxes of *any* state. A reading of the debates on all of these bills bears out the statement that the matter here under consideration was not referred to or brought in question.

Whatever construction is placed on the present law must be drawn from the language of the act. To hold because certain bills, not passed, and introduced only in the *Senate,* contain provisions different to those in the law as passed, that *Congress* has expressed its intention in relation to the subject matter of such differences, would be judicial legislation.

But not only on principle but under the authorities

it is clear that the action of the Senate upon these various bills is entitled to no consideration whatever.

In *Aldridge* v. *Williams*, 3 How., pp. 9, 24, Taney, C. J., laid down the rule as follows:

> "In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which the will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

In *U. S.* v. *Trans-Missouri Freight Assn.*, 166 U. S., 290, 318, it was sought to show by the debates in Congress that railroads were not included in the Sherman Act. The history of the bill and the various amendments offered were shown. This court said:

> "Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each house in relation to the meaning of the act. It cannot be said that a majority of both houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the Senate. All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein. There is, too, a general acquiescence in the doctrine that debates in Con-

> gress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body." (Citing authorities.)

In *Mitchell* v. *Great, etc., Mfg. Co.*, Fed Cas., 9, 662; 2 Story, 648, the rule was similarly laid down by Mr. Justice Story.

And a strong case to the effect that the rejection of a proposed amendment cannot be considered is *State* v. *Insurance Co.*, 66 Ark., 466; 45 L. R. A., 348; 51 S. W., 633.

The case of *Blake* v. *National Bank*, 3 Wall., 307, cited by counsel as holding a *contra* doctrine, was one where the journals of Congress were used to show that a badly expressed and apparently contradictory enactment, was occasioned by the introduction of an amendment without due reference to the language in the original bill. The case is no authority for their present contention.

The argument of appellee is also inconsistent. On the one hand it is insisted that tax priority is given to but a *single* state while on the other hand it is insisted with equal earnestness that preference is given to the taxes of *all* states in which the bankrupt had property.

In conclusion it is contended that the claim should be denied priority for the reason that in the absence of bankruptcy proceedings the state of New Jersey could not have enforced its claim in any other manner than as an ordinary creditor, inasmuch as the bankrupt had no property in New Jersey. This is an argument which should more properly be ad-

dressed to Congress. Of course if Section 64a was not in force the state of New Jersey would not be here seeking priority. And in this connection counsel state that the appellant is attempting to absorb "almost the entire fund" leaving creditors of more than $200,000 *absolutely unpaid.* There is no justification for any such statement in the record and outside of the record, the statement is inaccurate, as the estate has already paid a dividend. Such a suggestion was advanced under similar circumstances in the case of *In re Tilden,* 91 Fed., 500, but in a lengthy opinion the court overruled the contention.

There the trustee was required to pay taxes which were assessed on, and were a lien against exempt property, although the trustee never had possession thereof, and it was argued that

> "The amount in the hands of the trustee, if applied to pay these taxes on this exempt homestead, will be substantially exhausted leaving barely sufficient to pay expenses of administration of the estate."

But the court replied that "the statute requires such payment."

And *in re Stalker,* 123 Fed., 961 (Dist. Ct., W. D. New York), the court, in allowing priority as a tax to an assessment levied for local improvements, said:

> "The significance of Section 64a as applied to a municipality, is that a claim for taxes is paramount to all other claims, because of the pecuniary needs and requirements of the municipality, and so as to relieve the general taxpayers from the payment of an unfair proportion of taxes. Some seemingly unjust features may be presented by the application of the stringent provisions of the bankrupt act referred to, *but, as the law is plain and*

> *singularly free from ambiguity, it is obvious that Congress intended that the statute should be strictly construed and applied,* unless the facts disclose unjust or prejudicial results."

THE 1903 TAXES.

In reference to the 1903 taxes it is contended that they are not a proper claim because they are not due and payable until after the date of the adjudication. We replied to this contention on pp. 44-48 of our opening brief. As pointed out in our brief and in the opinion of the Court of Appeals, the 1903 taxes were a *fixed liability* on January 1st, 1903. The petition in bankruptcy was filed on April 23, 1903. The bankrupt thereafter made a return on May 2, 1903, showing the amount of its capital stock issued and outstanding on January 1, 1903. (Rec., 27.) The amount of the tax could not be thereafter changed by reducing or increasing the amount of the capital stock, or by the dissolution of the company.

The fact that the obligation does not mature until July 1st, is entirely immaterial as the Court of Appeals held in the present case.

In re Flynn, 134 Fed., 145, Judge Lowell said:

> "Under the statutes of Massachusetts, I think that the tax here in question became 'legally due and owing' May 1, 1899, *though not payable until after the adjudication.*"

And *in re Prince & Walter,* 131 Fed., 546 (Dist. Ct., M. D. Penn.), while an estate was in the hands of the trustee, it was assessed for taxes. The court referred to the provisions of the Bankruptcy Act and said:

> "Taxes, as a class, are thus put at the head of

everything—even above the expense of preserving the estate, or the cost of administering it. Brandenburg, Sec. 1008; Collier (4th Ed.), 459. This is explicit and decisive, and, as the taxes of 1901 are unquestionably within the provisions of the act, they must be paid.

The taxes of 1902 stand somewhat differently. They were not due and owing by the bankrupts at the time of their bankruptcy but have accrued since the proceedings were instituted, and do not, therefore, fall within the strict letter of the law. But the bankruptcy act does not withdraw the estates of bankrupts from the reach of the taxing powers, and they are subject, in consequence, to the payment of taxes imposed while they are in the hands of trustees, the same as if they were not."

(Citing cases.)

"Even though accruing after bankruptcy, they must be regarded as within the meaning of the statute, and entitled to priority, the same as those which antedated it. They are equally important to the municipalities to which they are due, whenever assessed, and the obligation of the property to respond is logically no different or greater at the one time than at the other. The same reasons existing in both cases, it must be assumed that no distinction was intended to be made between them. The taxes of 1902 must consequently be paid, the same as those of 1901, out of the personal fund, in preference to every other charge; and this includes the penalties for non-payment which are a constituent part of them."

Counsel cite a number of cases to the effect that a debt must be due and owing in order to be provable as such. With one exception the cases cited are all cases of claims for rent *accruing after* the adjudication in bankruptcy. The one exception is the case of

in re Aultman, Miller & Co., 12 Am. Bank. Rep., p. 12 (decided by a referee), where a claim was filed for an excise tax due the State of Ohio. It was there said:

> "The Bankruptcy Act does not make any distinction as to the character of the tax which is imposed. A license fee or franchise tax imposed by the state is recognized by the Federal courts as a tax, and as such would be entitled to priority of payment in bankruptcy proceedings. *Western Union Telegraph Co.* v. *Mass.*, 125 U. S., 530, 31 L. Ed., 790."

The only objection made to the tax was that it was not due at the time of the adjudication. The referee said:

> "There is nothing in the Bankrupt Act to warrant any inference that such a preferred claim is entitled to any greater privilege beyond the priority of payment, than other claims."

Does not a comparison of Sections 63 and 64 of the Bankruptcy Act "warrant any inference" that Congress intended to exempt taxes from the provisions of Section 63 governing provable debts, and allow them priority irrespective of when they were due? Otherwise, why direct the court "to order the trustee to pay?"

The referee continued:

> "It may be claimed that property in the hands of a receiver or trustee is subject to taxes to the state, county or municipality, the same as though in the custody of an individual, but in this case the excise tax is not a charge against property, and is expressly so held in the *Southern Gum Co.* v. *Laylin*. The tax in question is one imposed upon a corporation, not on account of its property, but on account of its right to exist and do

business as a person under the protection of the laws of the State of Ohio. Whether the corporation exists or not after the petition in bankruptcy is filed is not a question for discussion here. If the corporation is in existence, then under the act in question it is subject to this franchise tax, and like an individual who has gone into bankruptcy, would be subject to after-incurred indebtedness, and cannot have the same imposed upon its trustee in bankruptcy."

The referee in that case seems to have misconceived the scope of Section 64 just as the referee in the present case did. The preference allowed by that section is not limited to property taxes. The referee in the case cited conceded that accruing *property* taxes are a lien irrespective of the time they become due, and *in re Prince & Walter,* 131 Fed., 546, *supra,* it was expressly so held. In what respect does the present tax differ, under the Bankruptcy Act, from a *property* tax? Upon what theory can a discrimination between them be justified? If one is entitled to priority so is the other. The concluding language of the referee in the Aultman, Miller & Co. case, which is quoted in the brief of opposing counsel (pp. 75-76), may possibly present a reason why the law should be amended. It is the argument *ab inconvenienti.* Every one of the reasons advanced by the referee against the allowance of the preference applies with equal force to a strictly *property* tax which the referee practically conceded should be allowed. If a property tax should be allowed preference irrespective of time, then the present tax is also entitled to preference, as there is no ground in the law for any distinction.

But irrespective of these considerations, it will be found upon an examination of the Ohio law imposing the franchise tax, which was before the referee in the above case, that the tax was not due or owing, nor the liability fixed or determinable previous to the bankruptcy proceedings, as it is in the present case. In the Ohio case the taxes were levied for the year 1903. The petition in bankruptcy was filed on April 6, 1903, and the adjudication was had on April 28, 1903.

The referee in his opinion says:

> "The fee or excise tax * * * is evidently not made a charge for *past* enjoyment but * * * for the year ensuing *after* the filing of the annual report in May."

The law under which the tax was levied (Vol. 95, Laws of Ohio, p. 124, *et seq.*) provides that annually, during the month of *May*, every corporation shall report among other things the following:

> "5. The amount of authorized capital stock and the par value of each share.
>
> 6. The amount of capital stock subscribed, the amount of capital stock issued and outstanding, and the amount of capital stock paid up."

And that:

> "*Upon the filing of such report*, the secretary of state shall charge and collect from such corporation a fee of one-tenth of one per cent. upon the subscribed or issued and outstanding capital stock of said corporation, and to be not less than ten dollars in any case."

It is thus apparent that in the Ohio case the tax was not due or owing or the liability fixed until the month *after* the adjudication. In the present case

the tax was fixed and determined at least four months *preceding* the bankruptcy proceedings.

It is insisted however if the claim for the 1903 taxes is allowed, that no estate in bankruptcy can ever be closed as long as money remains in the treasury which can be applied to the payment of taxes. In the present case it is unnecessary to decide whether there is any time limit within which claims for taxes can be presented, inasmuch as no claim has been filed for the 1904 and 1905 taxes. Counsel say, however, that there is no difference between claiming a franchise tax for 1903 in the case at bar and in claiming one for 1904 and 1905. This position cannot be sustained for the reason that the liability for the 1903 taxes was fixed and determined on January 1, 1903, *previous* to the adjudication, while that would not be true with respect to the taxes for 1904 and 1905.

In this connection it is suggested in the opinion of referee Doyle, *in re Aultman, Miller & Co., supra,* that the franchise does not become an asset in the hands of the trustee, and therefore he should not be taxed on account of it. The question was put by Mr. Justice White on the oral argument, as to whether the franchise was an asset. While the franchise may or may not be an asset under the law of Ohio which was before the referee in the above case, it is an asset under the New Jersey law.

Chapter 127, Session Laws of New Jersey, 1897, p. 229 provides (Sec. 1):

> "Whenever the property and franchises of any corporation created by or under any law or laws of this state, except steam-railroad, canal, turnpike or plank-road companies, shall be sold and

conveyed under or by virtue of any decree or decrees of the court of chancery of this state, or of the Circuit Court of the United States in and for the district of New Jersey, sitting in equity, and an execution or executions issued thereon, to satisfy any mortgage debt or debts, judgment or judgments, or other incumbrance or incumbrances thereon, such sale and conveyance, duly made and executed, shall vest in the purchaser or purchasers thereof all the right, title, interest, property possession, claim and demand, in law and equity, of the parties to the suit or suits, action or actions, in which such decree or decrees was or were made, of, in and to the said property so sold with its appurtenances; *and also of, in and to the corporate rights, liberties, privileges and franchises of the said corporation,* but subject to all the conditions, limitations, restrictions and penalties of the said corporation of and concerning the same; and such purchaser or purchasers, and his or their associates not less than three in number, shall thereupon become a new body politic and corporate in fact and in law, by such name as said persons shall select, and shall be deemed and considered the stockholders of the capital stock of such new body politic and corporate, in the ratio and according to the amount of the purchase money by them respectively contributed; and shall be entitled to all the rights, liberties, privileges and franchises, and be subject to all conditions, limitations, restrictions and penalties of and concerning the said corporation whose property and franchises shall have been so sold and conveyed, which were contained in the act or acts creating, or under which the aforesaid corporation was created, and the supplements thereto, so far as the same was or were in force and unrepealed at the time of such sale and conveyance."

Under this law it is clear that in New Jersey the cor-

porate franchise is an asset which the court can sell and dispose of the same as any other property, and it is therefore of value in the hands of the receiver or trustee for at least the amount that the purchaser of the corporate property would be obliged to pay for the issuance of a new charter for the like amount of authorized capital stock. Such a franchise comes within the purview of Section 70a (clause 5) of the Bankruptcy Act which provides that the trustee shall be vested with the title to all property "which might have been levied upon and sold under judicial process."

But even if we assume that the corporate franchise is of no value whatever to the bankrupt estate, and even though the trustee never gets the title or possession of it, nevertheless the franchise taxes are clearly entitled to priority under the express words of Section 64a.

In the case of *In re Tilden,* 91 Fed., 500 (Dist. Ct. S. D. Iowa), the question is squarely decided. There the trustee was required to pay certain taxes assessed and due on the homestead of the bankrupt, and constituting a lien thereon at the time of the adjudication, although such homestead had been set apart to the bankrupt as exempt and the trustee never had title thereto. The court said (pp. 501-2):

> "The contention of the bankrupt is that taxes duly standing on the proper tax books against the exempt homestead are, within the meaning of this section, 'taxes legally due and owing by the bankrupt.' The phraseology of the statute apparently favors this contention,—'all taxes legally due and owing,' etc. There is no express exclusion of taxes against exempt property. The trus-

tee is to pay 'all taxes legally due and owing by the bankrupt.' The creditors, however, plead what they term the 'injustice' of such a construction. The exempt property may have a large amount of taxes standing against it. *The estate receives no benefit whatever from the exempt property.* Where, as here, there is no question as to the property being exempt the trustee, if he can in any wise be properly said to take such property, under the adjudication of bankruptcy, takes it only for the purpose of at once passing it out as exempt property. So that, if received by him affected by the lien for taxes, why should the trustee pass it back in a better condition than he received it? Wherein is his duty to lessen the general estate in his hands, by applying a part of same to the removal of said tax liens, and thus lessening the amount otherwise distributable to the general creditors? If a mechanic's lien, or other like lien, existed against said exempt property, the general assets of the estate would not ordinarily be thus lessened to effect the removal of such lien. And the creditors call attention to this case as plainly showing the unjust result, as they term it, of the opposite construction of the statute. *The amount in the hands of the trustee, if applied to pay these taxes on this exempt homestead will be substantially exhausted, leaving barely sufficient to pay expenses of administration of the estate;* and there seems much force in the argument. On the other hand, the bankrupt calls attention to the letter of the law,—'all taxes legally due and owing by the bankrupt.'—without any qualifying terms. And he properly insists that the burden is on the creditors to show why the statute does not intend what its terms plainly state. He also insists that this paragraph is a manifest recognition by congress of the proposition that, whether any other creditor be paid or not, the government—national, state or municipal—is to have its taxes out of the estate. Again, the bankrupt might have paid

these taxes at any time before filing his petition in bankruptcy. If, while on his way to the clerk's office to file such petition, he had stopped at the taxpaying office, and there paid these taxes, and thereby reduced the general assets (actually turned into the estate) by the amount of those taxes, no one could have justly complained. He very effectively inquires why is the general creditor now injured by payment of these taxes out of the estate, if their payment, as above suggested, could not have been complained of by him?"

In *City of Chattanooga* v. *Hill,* 139 Fed., 600 (C. C. A. 6th Cir.), the Court cited *In re Tilden,* 91 Fed., 501, with approval, saying:

> "That the bankrupt's creditors were not benefited by the bankrupt's homestead was held not enough to raise a doubt upon the plain meaning of so ambiguous a law."

And in the case of *In re Baker,* 1 Am. Bank. Rep., 526, a similar claim for taxes against *exempt* property was filed.

The court allowed the claim and said:

> "It is the opinion of the court that even if the city had no statutory lien on the property of the bankrupt the claim for taxes has priority and should be paid out of the proceeds of the property which is under the State law subjected to the payment of the debts of the bankrupt."

It is urged that appellant's entire claim should be allowed as a preferred claim.

Respectfully submitted,

LEVY MAYER,
ROBERT H. MCCARTER,
EDWARD D. DUFFIELD,
Attorneys for Appellant.

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JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

NO. [redacted]49

In re Cosmopolitan Power Company, bankrupt.

THE STATE OF NEW JERSEY, *Appellant,*

vs.

WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

MOTION OF APPELLEE TO DISMISS THE APPEAL AND BRIEF IN SUPPORT THEREOF

FREDERICK D. SILBER,
Counsel for Appellee.

CHAMPLIN LAW PRINTING CO.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1905.

NO. 302.

In re Cosmopolitan Power Company, bankrupt.

THE STATE OF NEW JERSEY, *Appellant,*

vs.

WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

MOTION TO DISMISS APPEAL.

Comes now William F. Anderson, as trustee in bankruptcy of Cosmopolitan Power Company, bankrupt, appellee, and moves this Honorable court to dismiss the appeal herein, for the reason that the determination of the question, involved in the rejection of appellant's claim to priority of payment, is not essential to a uniform construction of the Bankruptcy Act throughout the United States, and that therefore this Honorable Court has no jurisdiction of the subject-matter of said appeal.

Wherefore appellee prays that the appeal may be dismissed.

FREDERICK D. SILBER,
Counsel for Appellee.

NOTICE.

To the appellant, and to its counsel, Mr. Levy Mayer, Mr. Robert H. McCarter and Mr. T. A. Moran:

You are hereby notified that the appellee, William F. Anderson, trustee of Cosmopolitan Power Company, bankrupt, will, on the 13th day of November, A. D. 1905, on the convening of the United States Supreme Court on that day, or as soon thereafter as counsel can be heard, submit to said court his motion that the appeal by the State of New Jersey, from the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, be dismissed, as appears by the foregoing motion, and will submit the attached brief in support of said motion.

Yours respectfully,

FREDERICK D. SILBER,
Counsel for Appellee.

Service of copies of the said motion and brief are admitted this —— day of October, A. D. 1905, at Chicago, Illinois.

.....

.....

Counsel for Appellant.

STATEMENT OF THE CASE.

The Cosmopolitan Power Company, a corporation, was duly adjudicated a bankrupt by the District Court of the United States for the Northern District of Illinois. Thereafter, in said bankruptcy proceedings, the State of New Jersey filed its proof of claim (Rec., pp. 12 and 13) for $9,254.90, setting forth that said amount represented "franchise taxes" demanded by the said state from the bankrupt for the years 1902 and 1903, in the following items:

Tax, 1902	$5,750.00
Interest to October 15, 1903	891.25
Costs on injunction proceedings because of non-payment of taxes	26.15
Tax for 1903	2,500.00
Interest to October 15, 1903	87.50
Total	$9,254.90

Subsequently, appellant filed a petition before the referee in bankruptcy praying that said claim be given priority of payment under section 64 A, of the Act of Bankruptcy.

To the claim of appellant, as filed, objections were filed by appellee (Rec., p. 2), denying, *first*, that appellant was entitled to the amount claimed, and, *second*, that appellant was entitled to any priority of payment. Upon the hearing of said objections, the referee reduced the claim for the year 1902 from $5,750 to $4,250, and disallowed the entire claim for the year 1903, allowing appellant's claim in the total sum of $4,943.08, *as a general*, and not as a preferred, claim.

The ground of this ruling was that the claim *was not a tax*, and in arriving at this conclusion the referee followed the latest decision of the Court of Errors and Appeals of

New Jersey, *in re U. S. Car Co., 60 N. J. Eq., 514* (Rec., pp. 3-8).

Thereafter, appellant obtained a review of said ruling by the District Court for the Northern District of Illinois, where the order of the referee was affirmed (Rec., p. 26). From the order of the District Court appellant prayed and obtained an appeal to the United States Circuit Court of Appeals for the Seventh Circuit. In that court appellant contended that it was entitled to the allowance of the full amount claimed in its proof of claim, and that said amount should be paid in full, *on the ground that the claim was a tax*, and that it had been so held by the Court of Errors and Appeals of New Jersey, *in re Hancock* vs. *Singer Mfg. Co., 62 N. J. Law*, 289. Appellant contended that the *Singer* case, although decided earlier than the *U. S. Car Co.* case, was controlling, but this contention was denied by the judgment of the United States Circuit Court of Appeals for the Seventh Circuit (Rec., pp. 36 to 41). That court, however, directed the court below to increase the total amount of appellant's claim, by allowing the "franchise tax" claimed for the year 1903, as a general claim (Rec., p. 42). The reason for such direction was that when the petition in bankruptcy was filed against the Cosmopolitan Power Company, the franchise taxes for the year 1903 were potentially in existence as a debt, and therefore that amount could be said to be due at the time the petition in bankruptcy was filed.

Subsequently his Honor, Justice DAY, allowed appellant an appeal to this court (Rec., p. 42), and signed a certificate reciting that in his opinion the determination of the questions involved was essential to the uniform construction of the Bankruptcy Act throughout the United States.

BRIEF OF ARGUMENT.

THE COURT IS WITHOUT JURISDICTION OF THIS APPEAL BECAUSE THE DETERMINATION OF THE QUESTION INVOLVED IS NOT *essential* TO A UNIFORM CONSTRUCTION OF THE BANKRUPTCY ACT THROUGHOUT THE UNITED STATES.

The appeal at bar was taken under section 25, clause 2, of the Bankruptcy Act, which provides that an appeal may be had from a final decision of a Court of Appeals, allowing or rejecting a claim, where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim, *is essential to a uniform construction of the Bankruptcy Act throughout the United States.*

It will be seen that the jurisdiction of this court over such an appeal depends upon two propositions: *(a)* that the appeal involves the allowance or rejection of a claim under the act; *(b)* that the determination of the question involved in the allowance or rejection of such claim *is essential* to a uniform construction of the Bankruptcy Act throughout the United States.

Appellant claims to be entitled to priority of payment under section 64, A of the Bankruptcy Act, which provides as follows:

> "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality, in advance of the payment of dividends to creditors."

Appellee maintains that the only question, shown by appellant's petition for appeal and by the record, is whether or not the franchise tax of New Jersey, in question *is or is not*

a tax, and that the determination of that question is not essential to, and is not included in, the uniform construction of any part or portion of the Bankruptcy Act.

ARGUMENT.

Appellant contended before the referee, the District Court and the Court of Appeals, that the charge in question *was a tax,* and based such contention upon the statutes of New Jersey, and upon the decisions of the Court of Errors and Appeals of New Jersey, notably upon the case of *Hancock* vs. *Singer Mfg. Co.,* 62 N. J. Law, 289, decided November 14, 1898.

Appellant further contended that because the charge in question had been held to be a "tax" in the *Singer* case, that it was obligatory upon the court below to follow that decision, and allow priority to the claim. Appellee maintained in all of the courts below that the charge in question *was not a tax,* but was a contract obligation, and that it had been held to be not a tax by the Court of Errors and Appeals of New Jersey, *in re U. S. Car Co.,* 60 *N. J. Eq.,* 514, *decided July* 7, 1899. The referee held that the *U. S. Car Co.* case was controlling and, following the same, held the charge to be not a tax, and not entitled to priority of payment. He also held that the obligation was founded on contract (Rec., pp. 5, 6). The District Court, in affirming the referee, held to the same effect.

The Circuit Court of Appeals for the Seventh Circuit declared that the Court of Errors and Appeals of New Jersey had decided the nature of the obligation *in re U. S. Car Co.,* 60 N. J. Eq., 514, holding that the claim in question *was not*

a tax, and the court therefore followed the last decision of the highest court of said state (Rec., pp. 39, 40).

The pertinent query now arises, is it essential to the uniform construction of the Bankruptcy Act throughout the Union that this Honorable Court should determine which of the decisions of the Court of Errors and Appeals of New Jersey should control, whether the *Singer* case, or the *U. S. Car Co.* case? Is it essential to the uniform construction of the Bankruptcy Act throughout the Union that this Honorable Court decide on the present appeal, for the benefit of the executive department of the State of New Jersey, whether the judicial department meant to hold that the charge in question was or was not a tax? It is perfectly apparent that the purpose of this appeal is to obtain a decision from this Court to the effect that the so-called franchise tax of New Jersey upon the capital stock of corporations, *is in reality a tax*, so that the state may not longer suffer from the decision of its own highest court, *holding the charge to be no tax*. With such a purpose fairly shown on the record, we submit that the court should refuse to take jurisdiction of the appeal.

If counsel contend that the purpose of the appeal is to obtain uniformity in the decisions of the Bankruptcy Courts relating to the allowance of tax claims, that position is completely answered by the statement that *there is now absolute uniformity* on that question among the various Courts of Bankruptcy. The learned counsel for appellant have cited in their petition four cases in bankruptcy upon this question, and we shall discuss them in their order and show that the decision in each case rested upon exactly the same ground.

In re Ott, 2 A. B. R., 637, decided by the District Court for the Southern District of Iowa, July 5, 1899, the "mulct tax" of Iowa was in question. The county had filed such a

claim against the bankrupt and it was resisted on the ground that the claim was not a tax. The decisions of the highest court of Iowa were looked to, and the court said that if a construction of the statute in question had been directly and positively given, such construction would be accorded careful and weighty consideration; whether it would absolutely control was not decided by the court. But it was found that the Supreme Court of Iowa had directly decided that the "mulct tax" *was not a tax,* and hence the District Court refused to allow any priority to the claim. It will thus be seen that in the Ott case the court followed the decision of the Supreme Court of the state in construing the nature of the charge.

In re Mutual Mercantile Agency, 8 A. B. R., 435, the State of New Jersey claimed priority upon the same tax, called in question at bar. The referee followed the *Singer* case, but without apparently knowing of the decision in the *U. S. Car Co.* case, as the latter case is not even cited or mentioned in the opinion. However, the court followed what it believed to be the law of the state.

In re Danville Rolling Mill Co., 10 A. B. R., 327, Judge McPherson, of the District Court of Pennsylvania, denied the right of the State of New Jersey to priority upon a similar claim, following the Court of Errors and Appeals of New Jersey, as decided *in re U. S. Car Co.,* 60 N. J. Eq., 514. In his decision the court does not mention or refer to the *Singer* case, but follows what appears to be the law of New Jersey.

In re Emmerman vs. *Ohio Steel and Iron Co.,* 13 A. B. R., 40, decided by Referee Doyle, of the Northern District of Ohio, the laws of Ohio were construed with reference to the validity of a similar charge as a tax, and, after stating that the Bankruptcy Court would follow the decisions of the highest court of the state, the opinion proceeds:

> "But on the other hand, by whatever name the charge may be designated, even though it be called a tax, if the court of the state in which the question arises declares that the same is not a tax, then, and in that case, the Bankruptcy Court would not allow the same to be allowed as a tax; nor would it require the trustee to pay the same as a claim entitled to priority."

The referee, after considering the Ohio decisions, found that they held the charge in question to be a tax, and held that he would allow it priority unless it appeared that the bankrupt did not legally owe the same. On consideration of the latter question the court concluded that nothing was due the claimant at the time the petition in bankruptcy was filed, and hence that nothing could be allowed to the State of Ohio upon its claim. But, under the reasoning of the opinion, the court allowed as a priority whatever was due to the state, when the petition was filed, *because the Supreme Court of Ohio had held the charge to be a tax.*

It follows logically, from a consideration of the foregoing cases, being all of those cited by appellant, *that there is absolute uniformity* in the holdings of the various courts in respect to the allowance of claims based upon taxes; that all of the Bankruptcy Courts have followed the highest court of the state under whose laws the claim is made. *The only question upon which there has not been uniformity in the decisions is, whether or not the decisions of the highest court of New Jersey construe the charge in question to be a tax, the Mutual Mercantile Agency case holding it to be a tax, and the Danville Rolling Mill Co. case holding the opposite.* There is, therefore, absolutely nothing in the decision of the case at bar which is essential to a uniform construction of the Bankruptcy Act, but on the contrary, the only thing to be gained by a consideration of the case at bar, by this Honorable court, will be to settle for the benefit of the

State of New Jersey the mooted question of what its highest court considers to be the nature of the so-called franchise tax. We maintain that that is a question of interest solely to appellant and in no wise to the various Courts of Bankruptcy. If the State of New Jersey itself is unable to say whether the charge in question is or is not a tax, the various Courts of Bankruptcy will decide whether to allow New Jersey priority upon such claims, upon a consideration of the soundness of the respective conflicting decisions. We submit that no question of the construction of the Bankruptcy Act can be involved in such a consideration. The act requires the court to order the trustee to pay certain taxes. When a claim is made under this section, the courts have uniformly inquired whether the claim was based upon a tax and if they found that it was, they have uniformly ordered that the same be paid in full. There is a great difference, however, between determining whether or not the claim is a tax and determining which of the conflicting decisions made by the highest court of the state should control. It is clear that if the highest court of the state has not spoken on the subject, or if it has spoken inconsistently or without finally settling the matter, the Court of Bankruptcy would be under the duty of construing for itself the nature of the claim, and of deciding for itself whether it was or was not a tax. If it came to an erroneous conclusion in such a consideration, there would be no question of the construction of the Bankruptcy Act involved. It would be merely a question of the construction of the laws and decisions of the particular state interested.

For example, in the *Ott* case, *supra,* the statutes and decisions of Iowa in reference to the "mulct tax" were construed and the court found that while the statutes indicated an intention to make the charge a tax, the decisions of the Supreme Court of Iowa held that it was not a tax, and con-

sequently denied the claim any priority. While in the case of *Emmerman* vs. *Ohio Steel and Iron Co., supra,* the court found that the Supreme Court of Ohio had held the claim in question to be a tax, and would have allowed the claim priority excepting for the fact that nothing was due to the State of Ohio from the bankrupt on the day the petition in bankruptcy was filed. It is clear that there will always be lack of uniformity in the conclusions of the Bankruptcy Courts of the various districts, arising from differences in the statutes of the various states and in the decisions of their highest courts upon the particular tax claim asserted. *But this lack of uniformity and these differences are not based upon any different theory of construction of any part of the Bankruptcy Act, and can not furnish any basis for an appeal to this court.*

Appellant has referred to the language of the Court of Appeals where it said (Rec., p. 40):

> "If the legislature of the state gives the name tax to an exaction which is not a tax, and if the courts of that state join in the misnomer, surely the Bankruptcy Courts are not required to disregard the substance of the thing, to the detriment of other claimants. The state courts may authoritatively expound the substance and the Federal Courts will adopt such exposition; but whether the substance constitutes a tax or not is independent of the name."

Appellant has sought from this language to draw the conclusion that the court, in construing the nature of the claim, decided that it was not bound by the decisions of the highest court of the state. We submit that the language in question will not bear that construction. But even if it did, there would still be no question involved, *essential* to the uniform construction of the Bankruptcy Act. There is nothing in the Bankruptcy Act which prescribes the duty of a court to follow or not to follow the decisions of the

highest court of the particular state, in construing questions arising on claims made by such state, and therefore that argument of counsel for appellant does not become of any force on the question of jurisdiction.

It was also said in the petition for appeal, that the former decisions of this Honorable court should be followed in respect to franchise taxes, even if the decisions of New Jersey were not followed, by the court below. It is a sufficient answer to that contention to say that all of the lower courts followed the opinion of the highest court of New Jersey, in the case at bar. But if they had not, the cases cited in appellant's petition are not in point, because the franchise tax in question in those cases was in its nature *an entirely different exaction* from that in the case at bar, and the language used in those decisions would not, in our opinion, shed any light upon the nature of the charge in the case at bar.

It can not be argued that the allowance of the appeal on the certificate of his Honor, Mr. Justice DAY, was final, so as to preclude the court from a consideration of the jurisdictional question. The preliminary allowance of the appeal upon the certificate, under section 25, is no different than the preliminary allowance of an appeal in any other case by a Justice of this court, and, as we understand the practice, the court determines for itself whether it has jurisdiction, upon a motion properly made.

As was said in *Callan* vs. *May*, 2 Black., 541, by Mr. Chief Justice TANEY, on a motion to dismiss the appeal:

> "It seems to be supposed by counsel in the argument that an order of the judge of this court, allowing the appeal, was conclusive and that its validity was not now open to dispute. But the *allocatur* of a judge was never so considered. Writs of error to state court can not issue without the *allocatur* of a judge of this

court. Yet there is hardly a term in which a case of that description has not been dismissed upon the ground that the transcript did not show a case in which a writ of error would lie. A contrary doctrine would be exceedingly inconvenient if it could be maintained, and would throw upon a single judge the responsibility which properly belongs to the court. And it does not by any means follow that the judge who authorizes the appeal has made up his own mind that the party is legally entitled to it. He may, and no doubt often does, entertain doubts upon the subject, and may regard the point as new and undecided, and upon which different opinions may be entertained, and in such cases he grants the appeal in order to bring the matter before the court and enable it to decide for itself whether the case is not within their appellate jurisdiction as regulated by the act of Congress. The *allocatur* of a single judge certainly can not enlarge the appellate powers of this court beyond the limits prescribed by law, and that law does not authorize an appeal from an order directing execution to issue to enforce a judgment. The appeal is dismissed."

In conclusion we submit that the record at bar fails to disclose any section of the Bankruptcy Act whose construction is essential to the uniform construction of the act throughout the United States. That being the case, it leaves this Honorable Court without jurisdiction to entertain the appeal. We can see that it is highly desirable, from the standpoint of the State of New Jersey, that the *Singer* case, which counsel claim construed the charge in question to be a tax, should be upheld by the decision of this court, because, in view of the great number of bankrupt New Jersey corporations, the state will lose large sums if the Bankruptcy Courts do not construe the charge in question to be a tax; but surely that furnishes no reason why this Honorable Court should take jurisdiction of the present appeal.

Again, counsel in their petition for appeal (p. 12) show THAT ALL OF THE REVENUE OF THE STATE OF NEW JERSEY

IS DERIVED FROM THE IMPOSITION OF THE FRANCHISE TAX, WITH THE EXCEPTION OF A SMALL SCHOOL TAX. That may furnish a reason for the importance of the present appeal to the State of New Jersey, but it scarcely furnishes an argument which would tend to influence this Court to entertain jurisdiction of the appeal.

The estate of the Cosmopolitan Power Company, the bankrupt, has been reduced to cash, ready for distribution, for more than two years. Its proven liabilities exceed $200,000, while its total assets are about $16,000. The petition in bankruptcy was filed April 23, 1903. No dividends have ever been declared by reason of the fact that appellant's claim for priority, if allowed, would absorb about two-thirds of the entire estate. If this Honorable Court determines that it is without jurisdiction of the appeal nothing will stand in the way of an immediate distribution of the estate, and if such a conclusion should be reached, it would be to the great advantage of a large body of creditors that it be announced as early as possible. Believing that there is no theory upon which the present litigation can continue any longer, we earnestly urge that the appeal be dismissed.

Respectfully submitted,

FREDERICK D. SILBER,
Counsel for Appellee.

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JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

NO. 49

In re Cosmopolitan Power Company, Bankrupt.

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vs.

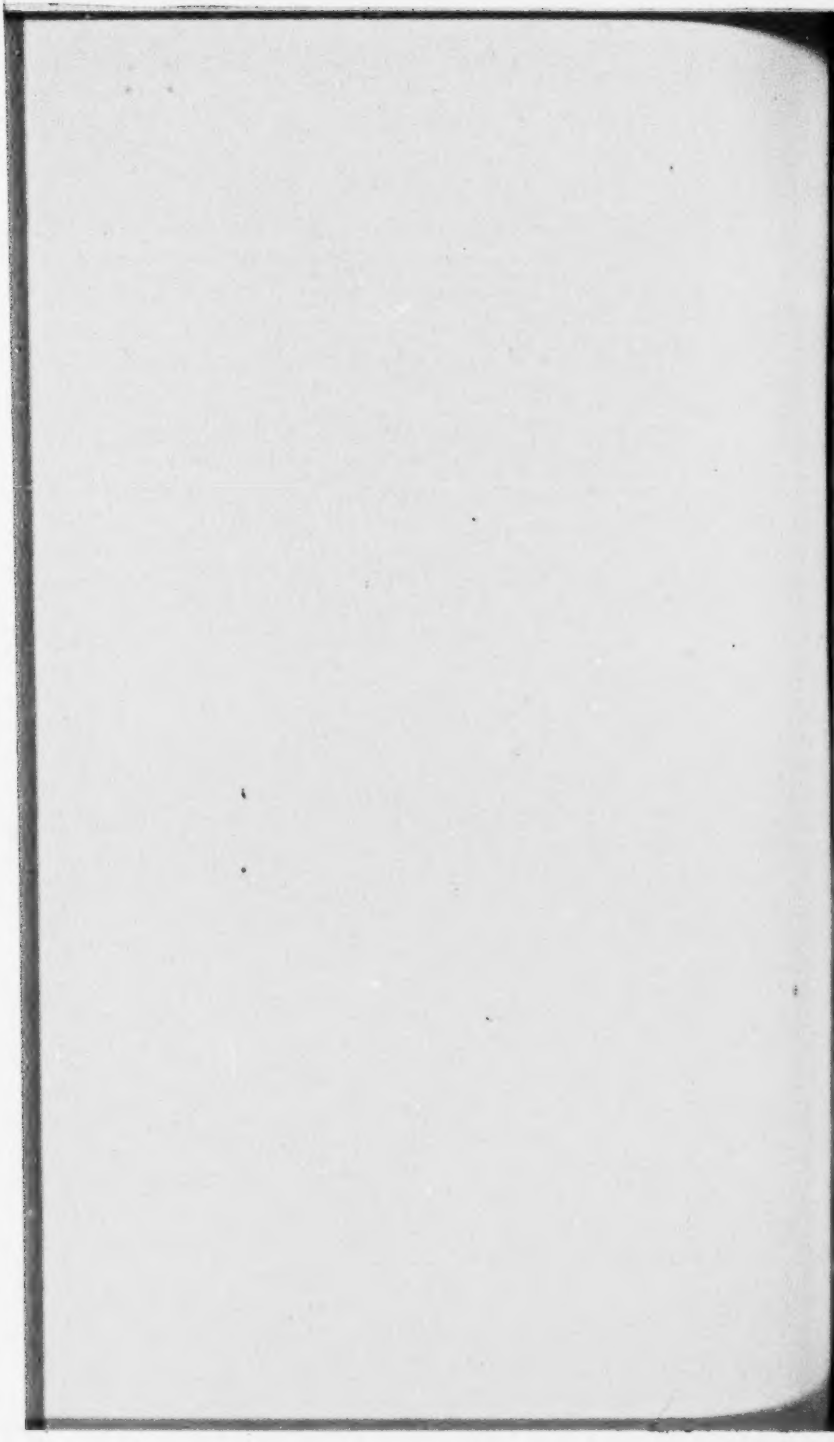
WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF OF APPELLEE, ON MOTION TO DISMISS THE APPEAL HEREIN.

FREDERICK D. SILBER,
Counsel for Appellee.

CHAMPLIN LAW PRINTING CO.



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OCTOBER TERM, A. D. 1905.

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In re Cosmopolitan Power Company, Bankrupt.

THE STATE OF NEW JERSEY, *Appellant,*

vs.

WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF OF APPELLEE, ON MOTION TO DISMISS THE APPEAL HEREIN.

I.

It is urged by appellant, in the suggestions in opposition to the dismissal of the appeal, that the jurisdiction of the court over this appeal depends not upon whether it is essential that some part of the Bankruptcy Act be given a uniform construction, but upon whether some justice of this court holds it AS HIS OPINION that such a matter be involved. It would seem as if the statement of this proposition would be sufficient to condemn it.

Jurisdiction means, among other things, the power existing in the court to hear or not to hear the matter in question. Can it be possible that this power shall be determined by the individual opinion of a justice, excepting for the mere purpose of bringing the matter before the whole court? It does not seem that such an intention can reasonably be attributed to Congress. If such an intention did exist, it would be the first instance that we can find, where the whole

court is deprived of the right to pass upon its power to hear and determine the matter, for the reason that a single justice holds the opinion that the court has or has not the power. To make such a radical change in the unbroken practice and rulings of this court, would require the clearest and most explicit language that could possibly be used. There is nothing, we submit, in the language of section 25 that denotes an intention to take such a radical departure from previous practice and decisions. On the contrary, it appears that the reasonable construction of section 25 of the Bankruptcy Act is, that the granting of the certificate by a single justice, which in turn depends upon his opinion, as to whether the matter involved is essential to the uniform construction of the Bankruptcy Act, is a mere means of bringing the entire record before the court, and is meant for no other purpose whatsoever.

Under the practice an appeal may be allowed, either by the court below, or by this court. When the act says that an appeal may be had if "some justice of this court shall certify that in his opinion, etc.," it merely declares what has been the practice, in similar matters for more than a century. To hold that the expression of the opinion of one justice gives the court absolute jurisdiction over a matter, which, without that opinion, would be entirely outside of the jurisdiction of the court, seems to us to create a dangerous tendency. The same matter presented at different times, to two different justices, might, in one instance, be held to involve the necessary elements and therefore to be within the jurisdiction of this court, while, on another occasion, it might be held by another justice to be without the essential requirements and therefore to be out of the jurisdiction. To adopt counsel's view in either case would mean that the expression of the opinion of a single justice would grant or withhold jurisdiction from this court—a result that could

never have been contemplated and which, in our judgment, will never be approved of by this Honorable Court.

We leave this branch of the subject with the conviction that nothing has been urged by appellant which will satisfy the court that there is any merit in the extreme position taken by counsel.

II.

There is no question of construction of the Bankruptcy Act here involved. Counsel for appellant have attempted to show that some question of construction of section 64 of the Bankruptcy Act is involved, but we can not, after reading and carefully considering their brief, find that they have pointed out any part of the statute which demands construction.

It is clear from their argument, that they do not distinguish between differences of opinion between courts, as to whether or not a particular charge *is a tax*, and the application of the bankruptcy statute when that prior question has been answered. For instance, in each of the bankruptcy cases cited by counsel, the first inquiry has been, is the claim in question a tax, in the light of the statutes upon which it is based, or of the decisions of the highest court of the particular state which has considered it? When the answer has been that the claim is a tax, then each of the bankruptcy courts has proceeded to allow it priority. When the answer has been that the claim is not a tax, then denial of priority followed. The decisions are harmonious and uniform in this respect. In each case the court determines first, whether, under the statutes and decisions of the state in question, the claim is a tax. Manifestly, this determination does not involve any consideration of the Bankruptcy Act.

Counsel, we believe, have lost sight of the fact that the record shows that the question involved is not whether

generally, a tax is entitled to priority under section 64, but whether this particular charge, claimed under the New Jersey statutes, is entitled to priority in payment, over the claims of other creditors of the bankrupt. The referee, the District Court and the Court of Appeals, have in turn held that the claim is not a tax, AND IN THIS HOLDING THEY HAVE FOLLOWED THE DECISION OF THE HIGHEST COURT OF NEW JERSEY AS AUTHORITY. In this no construction of the Bankruptcy Act is involved. The only complaint made by appellant is that the referee, the District Court and the Court of Appeals, followed a different decision of the highest court of New Jersey than they contended should control. If the court below had followed the *Singer* case, rather than the *U. S. Car Company case*, there would be no complaint by appellant. It seems to us that this consideration should dispose of the question that any construction of the Bankruptcy Act is involved in this appeal. The decisions of the various courts below required no construction of the Bankruptcy Act, because such decisions were based entirely upon a construction of the statutes of New Jersey and of the decisions of the highest court of that state. If a claim made under the laws of another state had been involved, the statutes and decisions of that state would have been examined and the court would have decided the question accordingly. But how can it be said that such differences in statutes and decisions involve any uniform construction of the Bankruptcy Act? In a claim made by the State of Pennsylvania, the court might find that under the statutes and decisions of Pennsylvania it was a tax and allow it priority, while on a claim made by the State of New Jersey the court might find that the exaction was not a tax, and deny it priority. But the difference in these holdings would not mean a lack of uniformity, in the application or construction of the Bankruptcy Act.

Counsel have been obliged to lay stress upon the language of the opinion of the Court of Appeals that even if the Singer case were controlling the court would not necessarily be bound to follow it blindly, and from that language they seek to draw the conclusion that there is involved in this appeal the question whether the bankruptcy courts must follow the state courts or whether they have a right to examine the substance of the thing claimed, and determine its nature for themselves. The answer to counsel's contention in this behalf is, that it makes no difference what the Court of Appeals might have done, had it not followed the decision of the highest court of New Jersey, *since it did in fact follow it,* and further that no construction of any part of the Bankruptcy Act is involved in the question whether the bankruptcy courts must follow the state courts in the decision of these and similar tax questions.

Again counsel claim, because the court reduced the taxes of 1902 from $5,750 to $4,250, that the right to make such reduction involves a construction of the Bankruptcy Act. This we can not see. The question of the amount allowed by the court is a question depending for its solution entirely on the local statutes which do not in any way involve a construction of the Bankruptcy Act.

It is clear that nothing involved in the record, at bar, is sufficient to clothe this Honorable Court with jurisdiction of the appeal. There is involved no section of the Bankruptcy Act whose construction is *essential* to the uniform construction of the act throughout the United States. There is involved merely the construction of the statutes and decisions of New Jersey, and the courts below have followed what they believed to be the law of New Jersey governing the particular tax claim in question. Whether or not the courts below followed the best considered or the most log-

ıcal decision of the highest court of New Jersey, is not a matter for investigation or decision upon this motion, but since it appears clearly that the courts below did construe the charge with reference to the decisions of the state court, ıhey have done all that appellant claims should have been done, and this leaves appellant without any just or reasonable cause of complaint. There should be an end to litigation of this character, which prevents settlement and distribution of a bankrupt estate, and since this appeal attempts to thrust upon this court the decision of questions that were never ıntended to be brought before this bar, we again urge that it should be dismissed.

Respectfully submitted,

FREDERICK D. SILBER,
Counsel for Appellee.

FILE COPY.

No. 49

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

In the matter of COSMOPOLITAN POWER COMPANY, *Bankrupt.*

STATE OF NEW JERSEY, *Appellant,*

vs.

WILLIAM F. ANDERSON, trustee of COSMOPOLITAN POWER COMPANY, Bankrupt, *Appellee.*

Office Supreme Court U.S.
FILED
JAN 27 1906
JAMES H. McKENNEY,
Clerk

MOTION, NOTICE, PETITION AND BRIEF ON BEHALF OF APPELLEE IN SUPPORT OF HIS MOTION FOR LEAVE TO ASSIGN CROSS-ERROR, OR FOR THE ALLOWANCE OF A WRIT OF CERTIORARI, TO PERMIT HIM TO ASSIGN ERROR UPON THE DECREE OF THE CIRCUIT COURT OF APPEALS.

HORACE KENT TENNEY AND
FREDERICK D. SILBER,
Counsel for Appellee.

CHAMPLIN LAW PRINTING CO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

In the matter of COSMOPOLITAN POWER COMPANY, *Bankrupt.*

STATE OF NEW JERSEY, *Appellant,*

vs.

WILLIAM F. ANDERSON, trustee of COSMOPOLITAN POWER COMPANY, Bankrupt, *Appellee.*

MOTION, NOTICE, PETITION AND BRIEF ON BEHALF OF APPELLEE IN SUPPORT OF HIS MOTION FOR LEAVE TO ASSIGN CROSS-ERROR, OR FOR THE ALLOWANCE OF A WRIT OF CERTIORARI, TO PERMIT HIM TO ASSIGN ERROR UPON THE DECREE OF THE CIRCUIT COURT OF APPEALS.

MOTION.

Comes now William F. Anderson, Trustee, appellee and petitioner herein, by Horace Kent Tenney and Frederick D. Silber, his counsel, and moves this Honorable court alternatively for leave to assign cross-error upon the record on behalf of appellee, or for a writ of *certiorari* or other proper process directed to the Honorable Judges of the United States Circuit Court of Appeals, for the Seventh Circuit, requiring said court to certify to this court for its review and determination, a certain cause in the said Court of Appeals, lately pending, wherein the State of New Jersey was appellant, and this petitioner, William F. Anderson, trustee, appellee; and to that end he now tenders herewith his petition and brief, a certified copy of the entire record in such

cause in said Circuit Court of Appeals, now being on file in the office of the clerk of this court, in case No. 302, entitled the *State of New Jersey, appellant* vs. *William F. Anderson, trustee, appellee,* and in case such *certiorari* is granted, that said transcript now on file be ordered to stand as a return to the writ.

Horace Stern

Frederick W. Seltzer.

Counsel for Appellee.

NOTICE.

To Messrs. Levy Mayer and Robert H. McCarter, counsel for appellant, State of New Jersey:

You and each of you are hereby notified that on Monday, the 12th day of February, A. D. 1906, upon the convening of the Supreme Court of the United States, or as soon thereafter as counsel can be heard, we shall move on behalf of William F. Anderson, trustee in bankruptcy of Cosmopolitan Power Company, appellee and petitioner in the above entitled cause, for the entry of an order authorizing said appellee to assign cross-error or for an order directing that a writ of *certiorari* issue to the Circuit Court of Appeals, for the Seventh Circuit, directing said court to certify to the Supreme Court of the United States, the record in the above entitled cause, for review and determination, and that if such *certiorari* be ordered, the transcript now on file be or-

dered to stand as a return thereto; upon which motions we shall submit the brief which is hereto attached.

Horace Kent Tenney

Frederick M. Sibley

Counsel for Appellee.

The foregoing notice is hereby accepted and delivery of a copy thereof and of the petition and brief in support of said motion are hereby acknowledged this 22 day of January, A. D. 1906.

.....

.....

Counsel for Appellant.

Petition for leave to Assign Cross-error, or for an Order for a Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

To the Honorable, the Chief Justice and associate justices of the Supreme Court of the United States:

Your petitioner, William F. Anderson, respectfully represents, that on April 23, 1903, a petition in bankruptcy was filed in the District Court of the United States for the Northern District of Illinois, against the Cosmopolitan Power Company, a New Jersey corporation, and that thereafter an adjudication was had in course; that on December 21, 1903, the said State of New Jersey, respondent, filed its proof of claim against said bankrupt in the sum of $9254.90, in and by which proof of claim the said respondent showed that the indebtedness claimed against said bankrupt arose upon license fees or franchise taxes levied by said respondent for the years 1902 and 1903, under the provisions of an act of the legislature of said State of New Jersey, together with interest and costs accruing upon said claims; that annexed to said proof of claim was a statement as follows:

Tax for 1902	$5,750.00
Interest to October 15, 1903	891.25
Costs on injunction proceedings because of non-payment of taxes	26.15
Tax for 1903	2,500.00
Interest to October 15, 1903	87.50
	$9,254.09

That thereafter, on February 12 1904, said respondent filed its motion for an order upon this petitioner as trustee to pay said claim of respondent in full as taxes in advance of the payment of dividends to the creditors of said estate.

That thereafter this petitioner as trustee, on the 4th of January, 1904, filed objections to said claim of the State of New Jersey, objecting to the allowance of any amount whatever to said claimant and objecting to the granting of any priority or preference to said claim as taxes, and objecting to the allowance of said claim upon other grounds; that said matter coming on to be heard upon said claim and the objections filed thereto, before the referee, an order was entered by said referee, reducing the taxes for 1902 from $5750 to $4250; reducing the interest upon the taxes for 1902 from $891.25 to $669.93, denying all taxes for 1903, and allowing to the State of New Jersey, respondent, a general claim in the sum of $4943.08.

That thereafter respondent filed a petition for review to the District Court, in which court, upon a hearing of said petition for review, an order was entered affirming the order of the referee.

That thereafter, said state of New Jersey, respondent, obtained an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, in which court, on April 11, 1905, the decree of the District Court was affirmed as to the amount allowed for license fee for 1902, and as to the denial of any priority to said claim, but the decree of the District Court was reversed as to the disallowance of the license fee for 1903, and the District Court was ordered to add to its allowance of a general claim the sum of $2,500, less certain rebates of interest upon said amount.

That thereafter, on the 11th day of May, the said State of New Jersey, appellant, procured from Mr. Justice Day, a

certificate that in his opinion the determination of the questions arising upon the record of said cause, is essential to the uniform construcion of the Bankruptcy Act throughout the United States, and an order allowing an appeal to said appellant; that said appeal was docketed in the office of the clerk of this court as No. 302, and that the transcript of the record upon said appeal has been printed and is now on file, reference to which transcript is hereby particularly had, to the same effect as if it were attached to this petition.

Your petitioner further represents, that he contended before said Circuit Court of Appeals, that the alleged taxes for 1903 should not be allowed as a claim against said bankrupt estate, for the reason that under the statutes of New Jersey, under which said alleged taxes were levied, the said Board of Assessors were required to make their return on or before the first Tuesday of May, in each year, and to certify and report the basis of the license fee or franchise tax on or before the first Monday of June in each year and that the statutes of New Jersey provided that such license fee or franchise tax, when determined, should be a debt due from such corporation to the state, on which the state might maintain an action at law. It was contended by petitioner in the Circuit Court of Appeals, that on April 23, 1903, the day the bankruptcy petition was filed against the Cosmopolitan Power Company, there was no indebtedness in existence or due from the bankrupt to the State of New Jersey and that such indebtedness did not arise until June 1st, subsequent to the filing of the bankruptcy petition.

It was further contended that the sum demanded by respondent as a franchise tax for 1903, was a contract obligation and not a tax, and that it could not be allowed as a claim against the bankrupt, because under the Bankruptcy Act, Section 63 A, a debt to be proved must be a fixed liabil-

ity absolutely owing, at the time of the filing of the petition against the bankrupt.

Your petitioner further represents, that the decree of the Circuit Court of Appeals, was erronous in that it directed the District Court to make an allowance for the franchise tax or license fee of 1903; that the State of New Jersey, appellant, procured an order allowing it an appeal to this court, on the last day of the thirty days allowed for taking such appeal; that if this court should take the view that the claim made by the State of New Jersey is entitled to priority, and render judgment accordingly, such priority might also extend to the license fee for 1903, which petitioner contends, was improperly allowed in any amount; that the same questions are involved in the consideration of the allowance of the license fee or franchise tax for 1903, as are involved in the allowance of the license fee for 1902, and since the court has taken jurisdiction to consider the questions involved in the allowance of the license fee for 1902, petitioner should be permitted, for the protection of the rights of creditors of said bankrupt estate, to assign error upon the allowance of the license fee or franchise tax for 1903, so that the entire case may be determined.

Petitioner further alleges that he is advised by counsel, that unless he be permitted to assign cross-error upon said record or unless this court orders that a writ of *certiorari* issue to said Circuit Court of Appeals, so that petitioner can assign error, upon its said decree, he may be deprived of any right or opportunity to complain of the action of said Circuit Court of Appeals, in reversing the decree of the District Court, and in directing said District Court to add to its allowance the sum of $2500, representing the license fee or franchise tax for 1903.

Wherefore, your petitioner respectfully prays for an order permitting him to assign cross-error, upon the record

filed in this court, in No. 302, entitled *The State of New Jersey, Appellant,* vs. *William F. Anderson, Trustee of the estate of Cosmopolitan Power Company, bankrupt, appellee;* or if that be not allowed, that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals, for the Seventh Judicial Circuit, commanding the said court to certify and send to this court, on a day certain, to be therein designated, a full and complete transcript of the record of proceedings of the said Circuit Court of Appeals, in the said case entitled *The State of New Jersey, Appellant* vs. *William F. Anderson, trustee of the Cosmopolitan Power Company, bankrupt Appellee,* No. 1122, to the end that the said cause may be reviewed and determined by this court, as provided by law, and that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate, and that so much of the decree of said Circuit Court of Appeals in the said case as required the District Court of the United States for the Northern District Illinois, to allow to said State of New Jersey respondent, the sum of $2500, less a certain rebate of interest, for the franchise tax or license fee of 1903, levied against the Cosmopolitan Power Company, bankrupt, may be reversed by this court.

Petitioner further prays, that in case this court awards a writ of *certiorari,* it will also order that the transcript of the record now on file in this cause stand as a return to said writ and be treated as the record for the purpose of hearing and deciding the errors assigned by petitioner upon the decision of the Circuit Court of Appeals, as above stated.

And your petitioner will ever pray.

Horace Kent Tenney...

Frederick N. Sibley...

Counsel for Petitioner.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

Frederick D. Silber, being first duly sworn on oath deposes and says, that he is one of the counsel for Willliam F. Anderson, Trustee of Cosmopolitan Power Company, bankrupt, the petitioner; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

Frederick D. Silber

Subscribed and sworn to before me a Notary Public in and for Cook county, Illinois, by said Frederick D. Silber, this 22 day of January, A. D. 1906.

Hettie Weisman.
Notary Public in and for Cook county, Illinois.

My commission expires. Nov. 3-1908.

Brief in Support of Said Motions on Behalf of Appellee, Petitioner.

This court has granted an appeal in this cause, not as a matter of right to the appellant, but for the purpose of settling questions of law, so that hereafter the decisions of lower courts may be uniform. It would therefore seem to be logically appropriate that the case be so presented to the court that it can decide *all the questions involved*. This, however, may not be accomplished unless an affirmative order is made in petitioner's favor, looking to that end.

For the purpose of the present application we may assume that no question arises as to the license fee for 1902 except that of priority of payment, and that is a debt absolutely payable at the date of bankruptcy and therefore a provable claim. As to the license fee for 1903, two questions arise; (1) whether it is a provable claim, and (2) if provable, whether it is entitled to priority.

The Court of Appeals has decided in favor of petitioner upon the question upon which the case was brought here by the State of New Jersey, and which applies to the claim for both years, *viz.*, that of priority; but has decided against petitioner upon the question whether the license fee for 1903 is a provable claim. If the latter is held not to be a provable claim, this of course, disposes of any question of priority. But if the decision of the Court of Appeals that it is a provable claim is sustained, then the question of priority arises as to that claim also.

As the question of the allowance of this license fee as a claim in bankruptcy is to be decided by the court, we submit that both phases of that question which the record presents should be passed upon.

To attain this end, and prevent what would be but a partial decision of the case, it seems necessary to allow the petitioner to assign cross-errors on the record filed on the appeal of the State of New Jersey, or to order a writ of *certiorari* in his favor.

The reasons for this, somewhat more fully stated, are as follows:

The District Court *disallowed* the claimed franchise tax or license fee for 1903, and denied all claim to priority to the reduced license fee for 1902.

Upon appeal by the State of New Jersey to the Circuit Court of Appeals, the judgment of the District Court was affirmed, in all respects excepting as to the allowance of any license fee for 1903, and as to that part of the order, the judgment of the District Court was reversed with direction to add to its allowance $2500, representing the license fee claimed for 1903, by the State of New Jersey.

Appellee could not appeal from the decree of the Circuit Court of Appeals, since the only question involved in such an appeal would be whether or not the Circuit Court of Appeals was right in allowing a general claim for the license fee of 1903. That did not involve a question which might have been taken on appeal or writ of error from the highest court of a state to this court; nor did it involve a question whose determination is essential to a uniform construction of the Bankruptcy Act throughout the United States. Under Sec. 25, of the Bankruptcy Act, these are the only cases in which an appeal may be had to this court. Appellee was therefore concluded by the decree of the Circuit Court of Appeals.

On the last day of the thirty days allowed by rule of this court for an appeal in bankruptcy matters appellant, the State of New Jersey, obtained a certificate from Mr. Justice

Day, as required by section 25, Par. 2, of the Bankruptcy Act, and an order allowing an appeal from the decree of the Circuit Court of Appeals. That appeal brings up the entire record for examination of such errors as are assigned by appellant, but the pratice of this court seems to confine appellee to a defense of the decree appealed from, unless cross-errors are allowed to be assigned by appellee against that part of the decree of the Circuit Court of Appeals which allowed $2500. This would seem to be the simplest way and consistent with the principles of procedure in an appeal in equity where the question before the reviewing court is whether the decree of the court below was right in justice and equity, and not merely whether error has been committed. It is because appellee finds himself in the position of being unable otherwise to argue that the Circuit Court of Appeals erred in adding $2500 to the allowance for the license fee of 1903, that this motion is made.

Appellant is attempting to obtain payment in full of the license fee for both 1902 and 1903. The referee, the District Court, and the Circuit Court of Appeals, have denied priority to the claim, and it was upon the alleged importance of the question of priority, that the appeal was allowed by the Honorable Justice who signed the certificate. If appellee should not be permitted to argue upon the hearing that $2,500 was improperly added to the claim of appellant, by the Circuit Court of Appeals, and this court held that the claim of appellant should be paid in full, it would mean that $2,500 would be taken from the bankrupt estate without an opportunity on the part of the estate to be heard on the rightfulness of the amounts allowed. Such a result plainly would be contrary to justice and equity, and would be brought about by the operation of technical rules of pratice, which ought not to be permitted to accomplish such an end.

On the other hand, all that is required to remove this hardship from appellee is an order from this court, allowing appellee to assign cross-error, or an order for a writ of *certiorari*, to which writ the record, which has already been filed and printed, can be ordered to stand as a return, thereby permitting appellee to bring before the court upon the hearing, every question which affects the justice and equity of appellant's claim. This action was taken in the case of the *United States Rubber Co.* vs. *American Oak Leather Co.* the final decision of which is reported in 181 U. S. 434.

Appellee is not litigating the matters at issue in his own right, but in his representative capacity as trustee of the bankrupt estate, and it is due to a large body of creditors of that estate that appellee be permitted to defend against the claim of appellant upon the merits, and to show that the decree of the referee, and the District Court was right and of the Circuit Court of Appeals wrong, insofar as it increased the allowance of the claim of appellant.

It is therefore submitted, that an order should be made, either allowing appellee to assign cross-error, or directing that a writ of *certiorari* issue and that the record now on file in this cause stand as a return to said writ. Such an order will meet the ends of justice and will place both parties before this court in that position of equality which equity and the law supposes them to occupy.

Respectfully submitted,

Horace Lurton Hunley

Frederick M. Miller

Counsel for Appellee.

Office Supreme Court U.
FILED
FEB 19 1906

No. [redacted]49

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

In the matter of **COSMOPOLITAN POWER COMPANY**,
Bankrupt,

STATE OF NEW JERSEY,
Appellant,

vs.

WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt,
Appellee.

REPLY SUGGESTIONS ON BEHALF OF APPELLEE, PETITIONER, ON MOTION FOR LEAVE TO ASSIGN CROSS-ERROR, OR FOR THE ALLOWANCE OF A WRIT OF CERTIORARI.

HORACE KENT TENNEY,
FREDERICK D. SILBER,
Attorneys for Appellee, Petitioner.

CHAMPLIN LAW PRINTING CO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

In the matter of **COSMOPOLITAN POWER COMPANY,**
Bankrupt,

STATE OF NEW JERSEY,
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vs.

WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt,
Appellee.

REPLY SUGGESTIONS ON BEHALF OF APPELLEE, PETITIONER, ON MOTION FOR LEAVE TO ASSIGN CROSS-ERROR, OR FOR THE ALLOWANCE OF A WRIT OF CERTIORARI.

Appellant, in the suggestions filed in opposition to our, motion, has seen fit to make an extended excursion into the record of the case at bar. The motion before the court requires no argument on the merits of the case, but reduces itself to the following considerations:—this court has allowed an appeal to the State of New Jersey, under that section of the Bankruptcy Act which grants such an appeal as a matter of grace, upon the certificate of a justice of this court, for the sole purpose of settling a question of construction of the Bankruptcy Act throughout the United

States. It is conceded that without an appeal granted under this section, appellant would have been unable to appeal to this court, as a matter of right. This appeal is granted presumably to dispose of the entire case, but by reason of certain technical rules of practice, which prevail, appellee is prevented from showing that the Court of Appeals erroneously allowed the license fee for 1903, to appellant, and unless appellee's motion is granted, this court may consider only a portion of the case made and argued in the Circuit Court of Appeals. The claim of appellant is for priority to be accorded the license fee *for the years 1902 and 1903*, and if appellant convinces this court that priority should be allowed at all, it might result in full payment of the license fee for both years, unless an examination is had of the correctness of the action of the Court of Appeals in allowing the license fee for 1903. It is conceded further, that appellee, petitioner, was concluded by the decree of the Circuit Court of Appeals, and could not, in the first instance, obtain a certificate allowing any further appeal, because the allowance of the license fee for 1903, did not involve any question of uniform construction of the Bankruptcy Act. The fact that appellee was concluded by the decree of the Court of Appeals is the best argument for the allowance of the pending motion, and it comes with poor grace from appellant, who has perfected an appeal by the favor of the court, to oppose a motion, the granting of which will result merely in the consideration of the entire record at bar.

Clearly, there are three questions which the court should determine in considering the case at bar, in order that justice and equity may be done to both parties:

First: What amount, if anything, should be allowed appellant as a license fee for 1902?

Second: What amount, if anything, should be allowed appellant as a license fee for 1903?

Third: Should the *total* amount allowed be given priority as a tax?

If the court should give the total amount allowed below priority as a tax, without considering the rightfulness of the allowance for 1903, manifest injustice may be done the creditors of the bankrupt estate in not investigating the rightfulness of the allowance for 1903, because if that allowance was properly denied by the referee and the District Court, then appellant will receive $2500 in cash out of the bankrupt estate, for 1903, that should never be paid. It is clear that a most inequitable result might be reached if petitioner is not allowed a writ of *certiorari* so that he can assign error upon the allowance for 1903.

We feel obliged to point out to the court, the inaccuracy of the statement made on page 2 of appellant's suggestions, where it is stated that "the present motion is made nearly nine months after our motion to dismiss the appeal was denied." The record will disclose that we moved to dismiss the appeal on November 13, 1905, which motion was disposed of two weeks later. About the middle of January, 1906, we served notice of the present motion. It will thus be seen that not two months intervened between the denial of the motion to dismiss the appeal and the present motion. Counsel for appellant are clearly mistaken in the statement thus made. We do not quarrel with the principles of law argued by counsel in their suggestions, but these principles are manifestly inapplicable to the disposition of the pending motion. While it is true that appellee might not be able to obtain a writ of *certiorari* if an appeal were not now pending, the circumstances surrounding the allowance of an appeal to appellant on a certificate of a

justice of this court will largely govern, we submit, the attitude of the court upon this motion.

Shall it be said, that because appellant was defeated on a question of the construction of the Bankruptcy Act, *and thereby was able to obtain a further appeal to this court*, that appellee shall not be permitted to bring the entire case here because, forsooth, no question of construction of the Bankruptcy Act was involved in that portion of the decree of the Court of Appeals, which was adverse to appellee? A dividend upon a general claim of $2,500 might be a matter of minor importance to the creditors of the bankrupt estate, but the payment of $2,500 in full, as a tax priority, would constitute a very different question. Unless the court allows the writ of *certiorari* to petitioner, appellant, by the mere allowance of the present appeal might be enabled to procure an inequitable advantage over appellee in the possibility of obtaining a preference on the license fee of 1903, where appellee is not permitted to demonstrate that any allowance for such 1903 license fee was erroneously made.

Appellant lays stress upon the caution with which the court surrounds the allowance of a writ of *certiorari*. The necessity for a writ depends upon the peculiar facts and conditions surrounding each separate case, but where a peculiar hardship and great injustice may result and where the petitioner is concluded, as in the case at bar, by the decree of the Court of Appeals, there is every reason for allowing the writ, especially when the complete record is already filed in this court, and the effect of the allowance would be merely to permit a consideration of the whole case and not of only a part of the real issues.

Where jurisdiction is taken to give uniformity to the interpretation of the Bankruptcy Act, there should be a full

and complete presentation of the case and not a partial consideration. The question of allowing a license fee when it was not actually due and owing at the time the petition in bankruptcy is filed, has been decided differently by the different bankruptcy courts. In the case at bar, the Court of Appeals, for the Seventh Circuit held, that such a license fee would be allowed as a claim against the estate, while *in re Aultman Miller & Co.*, 12 A. B. R., p. 12, the same question was decided by the District Court for the Northern District of Ohio, and the opposite conclusion was reached. The decision of Referee Doyle in that case was subsequently affirmed by Judge Wing as appears in the 13 A. B. R. in the note on page 39.

In re Emmerman vs. *Ohio Steel & Iron Specialty Co.*, 13 A. B. R., p. 40, the same question was considered by the same referee, and District Court, and decided *against* the state claiming the tax. This striking difference of opinion upon the very question involved in the case at bar should furnish most persuasive reason for the allowance of the present motion in order that all of the vexed questions arising on the record may be settled in the same decision, and as early as possible.

Although counsel for appellant alleges the contrary, yet it will be found on examining the record in the case of *Fargo* vs. *American Oak Leather Co.*, 181 U. S., 434, that the writ of *certiorari* was allowed in that case for the express purpose of permitting the appellees to obtain the benefit of an assignment of error, where otherwise they would

have been heard only in support of the decree rendered by the Court of Appeals.

We submit that the motion should be allowed.

Respectfully submitted,

Horace Hart Harney

Frederick W. Sibley

Attorneys for Appellee, petitioner.

FILE COPY.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1906.

Office Supreme Court, U.
FILED.
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JAMES H. McKENNE
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No. 49

THE STATE OF NEW JERSEY,
Appellant,

vs.

WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt,
Appellee.

Appeal from and Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT ON BEHALF OF APPELLEE.

HORACE KENT TENNEY,
FREDERICK D. SILBER,
Counsel for Appellee.

Geo. Hornstein Co., Printer, Chicago.

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BRIEF AND ARGUMENT ON BEHALF OF APPELLEE.

STATEMENT OF THE CASE.

The Cosmopolitan Power Company was a New Jersey manufacturing corporation and originally incorporated with $40,000,000 of authorized capital stock. On May 13, 1902, the capital stock was reduced in accordance with the laws of New Jersey to $2,500,000.

On January 1, 1902, $10,000,000 of capital stock was issued and outstanding.

The corporation was adjudicated a bankrupt by

the United States District Court for the Northern District of Illinois, on a petition filed April 23, 1903. Thereafter, in the bankruptcy proceedings, on December 22, 1903, the State of New Jersey filed its claim as a creditor against the bankrupt corporation for $9,254.09, based upon license fees or franchise taxes, under Chapter 159 of the Laws of 1884. This claim was made up as follows:

For the taxes of 1902	$5,750.00
Interest thereon, to Oct. 15, 1903, at 1% monthly	891.25
Court costs, laid out on injunction proceedings against the corporation, because of non-payment of the taxes	26.15
Taxes for 1903	2,500.00
Interest to Oct. 15, 1903	87.50
Total	$9,254.90

The claim was filed in the form prescribed for an ordinary proof of debt (Rec., p. 12), alleging that the state held no note or judgment.

On February 12, 1904, the claimant State, filed its motion before the Referee in said bankruptcy proceedings, referring to said proof of claim, praying for an order upon the Trustee, to pay all of said claim in advance of the payment of dividends to creditors, as taxes legally due and owing by the bankrupt. The Trustee filed objections to the claim, and opposed the motion and upon a hearing of all of said matters before the Referee, an order was entered, denying all claim to priority, finding that the claim was not a tax, reducing the claim for the year 1902 to the sum of $4,250, and disallowing entirely the claim for 1903, making a total allowance

of $4,943.08, as a general claim. It appeared from the stipulation of facts entered into by the parties, before the Referee, that the bankrupt corporation made no return to the Board of Assessors for the year 1902, as required by the New Jersey statutes (Rec., p. 13), and that in pursuance of law, the assessors, *on November 7, 1902,* levied and reported to the state comptroller an assessment of *$5,750,* not upon the actual outstanding capital stock, but upon an amount ascertained by the Board in such manner as was deemed most practicable. It further appears that said sum of $5,750 would have been the amount properly levied upon a total capital stock of *$40,000,000* (Rec., p. 15), and that the actual amount then issued and outstanding was *$10,000,000.* Moreover, it appeared that said corporation filed the return required by law for 1903, upon $2,500,000 capital stock outstanding, and that an assessment of $2,500 was made on June 1, 1903, by said Board of Assessors. (Rec., pp. 15 & 16.)

The corporation was organized in April, 1900 (Rec., p. 22), with its principal office in Jersey City, New Jersey, *and never had any property within the State of New Jersey,* but did all of its business from its office in Chicago, Illinois.

A certificate of review from the order of said Referee having been prayed by appellant, the District Court made an order thereon, confirming and approving the order of the Referee. Upon a further appeal to the United States Circuit Court of Appeals for the Seventh Circuit, a decree was entered affirming the order of the District Court in all respects excepting that the claim for 1903, amounting

to $2,500, was ordered allowed as a general claim, with a certain rebate of interest. (Rec., p. 42.) Appellant obtained a certificate from Mr. Justice Day, permitting a further appeal to this court on May 11, 1905.

Thereafter appellee made a motion to dismiss said appeal for want of jurisdiction, which motion was denied by this court, and subsequently, upon a petition for a writ of *certiorari* to enable appellee to assign error from that much of the decree of the Circuit Court of Appeals which ordered the allowance of the claim for 1903 as a general claim, such petition was granted, a writ issued, and an order was made that the record on file stand as a return to said writ.

BRIEF OF POINTS AND AUTHORITIES.

I.

The Claim is not Entitled to any Priority.

a

The proper construction of Section 64 A, of the Bankruptcy Act of 1898, requires that only such taxes be paid as priorities as could be collected from property within the juridictional limits of the taxing body at the time the petition was filed. Said section does not provide for the payment of taxes due *all* states, counties, etc., but due *the* state, *the* county, etc.

Both the language of the section and the history of the legislation plainly shows that such intention was in the mind of Congress.

b

The license fee or "franchise tax" in question is not a tax, according to the decisions of the courts of New Jersey, and other courts.

in re U. S. Car Co., 60 N. J. Eq., 514.

In re Ott, 2 A. B. R., 637.

In re Danville Rolling Mill Co., 10 A. B. R., 327.

In re Aultman, Miller & Co., 12 A. B. R., 12.

North Jersey Street Ry. Co. v. *Mayor of Jersey City, etc.*, 63 Atl. Rep., 83.

Cooley on Taxation, vol. 1, pp. 6 and 7.

Singer Mfg. Co. v. *Heppenheimer*, 58 N. J. Law, 634.

Hancock v. *Singer Mfg. Co.*, 62 N. J. Law, 289.

Lumberville Bridge Co. v. *Assessors*, 55 N. J. Law, 537.

American Smelting & Refining Co. v. *People*, 82 Pac. Rep., 531.

c

The license fee for 1902 never became a valid charge, because the Board of Assessors had no right under the statute to levy it *in November*. The statute requiring the levy *in June is mandatory* and not directory. The court will not give priority to an allowance that never should have been made.

II.

Regardless of any priority, the reduction of the claim for 1902 was proper.

The District Court had the right to investigate the legality and amount of the tax for 1902, and to reduce it, under section 64 A, and the Board of

Assessors had no power to make the charge on any capital stock *not issued and outstanding.*

Trenton Heat & Power Co. v. *State Board of Assessors,* 63 Atl. Rep., 1005.

Arimex Copper Co. v. *State Board,* 69 N. J. L., 121.

Peoples Investment Co. v. *Assessors,* 37 Vroom, 175.

III.

On Certiorari.

The claim for 1903 should be disallowed, because said claim was not in existence and did not constitute a debt, at the time the bankruptcy petition was filed, and was not then "a tax legally due and owing."

Re Aultman, Miller & Co., 12 A. B. R., 12.

Emmerman v. *Ohio Steel & Iron Co.,* 13 A. B. R., 40.

Forms of the U. S. Supreme Court in Bankruptcy, Nos. 31 to 36.

Assignment of Error upon Certiorari.

The court having granted a writ of certiorari and having ordered the record on file to stand as a return to the writ, it will, in our judgment, simplify the argument to treat the assignment of error upon the writ of certiorari as cross-error and to argue it as part of appellee's argument.

Appellee assigns error upon that much of the decree of the United States Circuit Court of Appeals for the Seventh Circuit, which reversed the decree of the District Court, and which ordered the license fee for 1903 to be allowed in the sum of $2,500, less a rebate of interest at one per cent a month, from

July 1, 1903, back to April 23, 1903, as a general claim against the bankrupt.

ASSIGNMENT OF ERROR BY APPELLEE UPON CERTIORARI.

Comes now William F. Anderson, trustee of Cosmopolitan Power Company, bankrupt, by Horace Kent Tenney and Frederick D. Silber, his attorneys, and files herein the following assignments of error, upon which he will rely to reverse that much of the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in said cause of State of New Jersey v. William F. Anderson, trustee of Cosmopolitan Power Company, bankrupt, being a certain judgment entered therein on April 11, 1905, whereby said court directed that so much of the judgment and decree of the District Court of the United States, for the Northern District of Illinois, entered on September 12, 1904, in the matter of the Cosmopolitan Power Company, bankrupt, be reversed and that said District Court be ordered to add to its allowance of a general claim, the sum of $2,500, less a rebate of interest at one per cent per month from July 1, 1903, back to April 23, 1903.

1. For that said United States Circuit Court of Appeals for the Seventh Circuit erred in holding that said State of New Jersey was entitled to the allowance of any claim for license fees or franchise taxes for the year 1903, against said bankrupt.

2. For that the said United States Circuit Court of Appeals for the Seventh Circuit erred in holding that upon the day of the filing of the bankruptcy petition against the Cosmopolitan Power Company, bankrupt, said State of New Jersey had a provable claim against said bankrupt, or was entitled to any

allowance for license fees or franchise taxes for the year 1903, against said bankrupt.

3. For that said United States Circuit Court of Appeals for the Seventh Circuit erred in reversing any part or portion of the judgment of the District Court of September 12, 1904, and in taxing any costs against the appellee in said court.

Wherefore in order that the foregoing assignment of error may be and appear of record, the said William F. Anderson, as trustee aforesaid, presents the same to the court and prays that such disposition be made thereof, in accordance with law and the statutes of the United States in such case made and provided, and that so much of said judgment of said United States Circuit Court of Appeals, as reverses any part of the judgment of the District Court for the Northern District of Illinois, of September 12, 1904, may be reversed and said order and judgment of the District Court be ordered affirmed in all respects.

HORACE KENT TENNEY,
FREDERICK D. SILBER,
Attorneys for Said Appellee,
William F. Anderson, as Trustee.

ARGUMENT.

I.

The claim of the State of New Jersey is not a tax, and cannot be allowed any preference over the other creditors of the bankrupt.

Counsel for appellee expected to argue this case orally.

Ever since the record was filed, almost a year and a half ago, we have been in communication with the clerk of this court, so that we might be exactly informed when the case would be reached for argument. We received appellant's brief on October 18th, and on October 19th the case appeared upon the call for the first time, and was reached and argued by appellant. We had been informed that there was no likelihood that it would be reached before the week of October 22nd, and hence were taken by surprise, and prevented from appearing in time to make our argument.

Thus, unfortunately, we were deprived of an opportunity to present our side of the case orally to the court. This we regret all the more, because the questions involved are of great interest and importance to the administration of the Bankruptcy Act, and we are advised that many similar cases have been awaiting the decision of this case.

Before a court of bankruptcy is justified in allowing a claim as a tax, it must appear clearly that it is in reality a tax. The court would not accord such an unusual privilege as priority to a claim whose status as a tax was doubtful, nor would the

court indulge in any presumptions as to the nature of the claim in favor of its being a tax. The allowance of priority is at the expense of the general creditors, and in a case like that at bar, where almost the entire estate will be absorbed if the claim of New Jersey for $9,254.90 should be allowed and paid in full, it behooves the court to be clearly satisfied that the claimant is entitled to the special favor of priority.

The Referee, the District Court and the Circuit Court of Appeals, have each in turn found that the exaction in question *was not a tax.* They have all agreed that the claim in question was based upon a contract to pay to the state such sum in annual instalments, as it required from the corporation for the mere privilege of existing, for the franchise *to be.*

The mere reading of the opinion of the Referee (Rec., pp. 3 to 8), and of the Circuit Court of Appeals (Rec., pp. 36 to 41), gives cogent reason for arriving at such a conclusion and we submit that this court would not disturb the judgment of the courts below, unless it clearly and convincingly appeared that the claim was an actual tax and not one merely called by that name.

The claim arises under the statutes of the State of New Jersey, being Chapter 189, of the Public Laws of 1884, entitled, "An Act to Provide for the Imposition of State Taxes Upon Certain Corporations, and for the Collection Thereof."

These statutes in substance provide that all corporations organized under the laws of New Jersey shall pay an annual *license fee* or franchise tax

of 1/10 of one per cent on all amounts of capital stock issued and outstanding, up to and including the sum of $3,000,000, etc. Other sections of the act provide for the ascertainment of the amount either by return of the corporation or by the State Board of Assessors, upon information and belief, provide for a report by the State Board of Assessors to the comptroller on or before the first Monday in June of each year, as to the amounts of such license fee or franchise tax, provide for interest being charged after July 1st of each year, provide that *such tax, when determined, shall be a debt due from the corporation to the state for which an action at law may be maintained* and a preferred debt in case of insolvency, provide for the issuing of an injunction to restrain the corporation from the exercise of its franchise after the debt shall have been in arrears for three months, and for other remedies to the state by forfeiture of the charter.

We set out the appropriate sections in full, using the section numbers adopted in Dill's New Jersey Corporations, (1902).

> "150. STATE TAXATION OF BUSINESS CORPORATIONS; REPORT TO STATE BOARD OF ASSESSORS.
>
> "All corporations incorporated under the laws of this state, other than those which are subject to the payment of a state franchise tax assessed upon the basis of gross receipts, shall make ANNUAL RETURN to the state board of assessors on or before the FIRST TUESDAY OF MAY in each year, and shall state therein the amount of the capitalSTOCK OF SUCH CORPORATION ISSUED AND OUTSTANDING ON THE FIRST DAY OF JANUARY preceding the making of said return, together with

such other information as may be required by said board to carry out the provisions of this act, and shall pay *an annual license fee or franchise tax* of one-tenth of one per centum on all amounts of capital stock issued and outstanding up to and including the sum of three million dollars; on all sums of capital stock issued and outstanding in excess of three million dollars and not exceeding five million dollars, *an annual license fee* or franchise tax of one-twentieth of one per centum, and the further sum of fifty dollars per annum per one million dollars, or any part thereof, on all amounts of capital stock issued and outstanding in excess of five million dollars; *provided,* that this act shall not apply to railway, canal or banking corporations, or to savings banks, cemeteries or religious corporations, or purely charitable or purely educational associations not conducted for profit, or manufacturing or mining corporations at least fifty per centum of whose capital stock issued and outstanding is invested in mining or manufacturing carried on within this state, and which mining or manufacturing corporations shall have stated in the annual return to the state board of assessors where the mine or manufacturing establishment of such corporation or corporations is or are located, the character of the ores mined or the goods manufactured, the total amount of its capital stock embarked in the business of mining or manufacturing and the amount of capital stock actually employed in New Jersey in carrying on such mining or manufacturing business; if any manufacturing or mining company carrying on business in this state shall have less than fifty per centum of its capital stock, issued and outstanding, invested in business carried on within this state, such money shall pay *the annual license fee* or franchise tax herein provided for companies not carrying on business in this state, but shall be entitled, in the computation of such

tax, to a deduction from the amount of its capital stock issued and outstanding of the assessed value of its real and personal estate so used in manufacturing or mining."

"151. PENALTIES FOR FALSE STATEMENT, OR FAILURE TO MAKE STATEMENT.

"If any officer of any company required by this act to make a return, shall, in such return, make a false statement, he shall be deemed guilty of perjury; if any such company shall neglect or refuse to make such return within the time limited as aforesaid, the state board of assessors shall ascertain and fix the amount of the *annual license fee* or franchise tax, and the basis upon which the same is determined, *in such manner as may be deemed by them most practicable,* and the amount fixed by them shall stand as such basis of taxation under this act."

"152. DUTIES AND POWERS OF STATE BOARD OF ASSESSORS.

"The state board of assessors shall certify and report to the comptroller of the state, on or before the first Monday of June in each year, a statement of the basis of the *annual license fee* or franchise tax as returned by each company to, or ascertained by, the said board, and the amount of tax due thereon respectively, at the rates fixed by this act; such tax shall thereupon become due and payable, and it shall be the duty of the state treasurer to receive the same; IF THE TAX OF ANY COMPANY REMAINS UNPAID ON THE FIRST DAY OF JULY, after the same becomes due, the same shall thenceforth bear INTEREST AT THE RATE OF ONE PER CENTUM FOR EACH MONTH until paid; THE STATE BOARD OF ASSESSORS SHALL HAVE POWER TO REQUIRE OF ANY CORPORATION SUBJECT TO TAX UNDER THIS ACT SUCH INFORMATION OR REPORTS TOUCHING THE AFFAIRS OF SUCH COMPANY AS MAY BE NECESSARY TO CARRY OUT THE PROVISIONS OF THIS ACT; and may require the production of the books of such company, and may swear and examine witnesses in relation

thereto; the comptroller shall receive as compensation for his services under this act and under the act entitled 'An act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four, the sum of five hundred dollars annually."

"153. TAX IS A DEBT; HOW COLLECTED; PREFERRED IN CASE OF INSOLVENCY.

"Such tax, when determined, *shall be a debt* due from such company to the State, for which *an action at law* may be maintained after the same shall have been in arrears for the period of one month; such tax shall also be a preferred debt in case of insolvency."

"154. INJUNCTION AGAINST COMPANY IN ARREARS FOR THREE MONTHS.

"In addition to other remedies for the collection of such tax it shall be lawful for the attorney-general, either of his own motion or upon request of the state comptroller, whenever any tax due under this act from any company shall have remained in arrears for a period of three months after the same shall have become payable, to apply to the court of chancery, by petition in the name of the state, on five days' notice to such corporation, which notice may be served in such manner as the chancellor may direct, for an injunction to restrain such corporation from the exercise of any franchise, or the transaction of any business within this state until the payment of such tax and interest due thereon, and the costs of such application, to be fixed by the chancellor; the said court is hereby authorized to grant such injunction, if a proper case appears, and upon the granting and service of such injunction, it shall not be lawful for such company thereafter to exercise any franchise or transact any business in this state until such injunction be dissolved."

"155. FOR FAILURE FOR TWO YEARS TO PAY STATE TAX CHARTER VOID, UNLESS GOVERNOR GIVES FURTHER TIME.

"If any corporation heretofore or hereafter created shall for two consecutive years neglect or refuse to pay the State any tax which has been or shall be assessed against it under any law of this state and made payable into the state treasury, the charter of such corporation shall be void, and all powers conferred by law upon such corporation are hereby declared inoperative and void, unless the governor shall for good cause shown to him, give further time for the payment of such taxes, in which case a certificate thereof shall be filed by the governor in the office of the comptroller, stating the reasons therefor."

"159. ATTORNEY-GENERAL MAY PROCEED AGAINST CORPORATIONS IN ARREARS; RECEIVER MAY BE APPOINTED.

"After any corporation of this state has failed and neglected for the space of two consecutive years to pay the taxes imposed on it by law, and the comptroller of this state shall have reported such corporation to the governor of this state, as provided in said amendatory act, then it shall be lawful for the attorney-general of this state to proceed against said corporation in the court of chancery of this state for the appointment of a receiver, or otherwise, and the said court in such proceeding shall ascertain the amount of the taxes remaining due and unpaid by such corporation to the state of New Jersey, and shall enter a final decree for the amount so ascertained, and thereupon a *fieri facias* or other process shall issue for the collection of the same as other debts are collected, and if no property which may be seized and sold on *fieri facias* shall be found within the said state of New Jersey, sufficient to pay such decree, the said court shall further order and decree that the

said corporation, within ten days from and after the service of notice of such decree upon any officer of said corporation upon whom service of process may be lawfully made, or such notice as the court shall direct, shall assign and transfer to the trustees or receiver appointed by the court, any chose in action, or any patent or patents, or any assignment of, or license under any patented invention or inventions owned by, leased or licensed to or controlled in whole or in part by said corporation, to be sold by said receiver or trustee for the satisfaction of such decree, and no injunction theretofore issued nor any forfeiture of the charter of any such corporation shall be held to exempt such corporation from compliance with such order of the court; and if the said corporation shall neglect or refuse within ten days from and after the service of such notice of such decree to assign and transfer the same to such receiver or trustee for sale as aforesaid, it shall be the duty of said court to appoint a trustee to make the assignment of the same, in the name and on behalf of such corporation, to the receiver or trustee appointed to make such sale, and the said receiver or trustee shall thereupon, after such notice and in such manner as required for the sale under *fieri facias* of personal property, sell the same to the highest bidder, and the said receiver or trustee, upon the payment of the purchase-money, shall execute and deliver to such purchaser an assignment and transfer of all the patents and interests of the corporation so sold, which assignment or transfer shall vest in the purchaser a valid title to all the right, title and interest whatsoever of the said corporation therein, and the proceeds of such sale shall be applied to the payment of such unpaid taxes, together with the costs of said proceedings."

"162. PROCEEDINGS FOR READJUSTMENT OF EXCESSIVE OR UNJUST ASSESSMENT.

"The officers of any corporation who shall consider the tax levied under the provisions of an act to which this act is a further supplement, excessive or otherwise unjust, may make application to the state board of assessors for a review of the assessment and a readjustment of the tax; *provided*, there be filed with the said board *within three months from the date of assessment* a petition of appeal, duly verified according to law, stating specifically the grounds upon which the appeal is taken and the reasons why the tax is considered excessive or unjust; the state board of assessors shall thereupon proceed to investigate the contentions raised by the said petition of appeal; and for the purpose of such hearing, the officers of said corporation may be summoned to appear before said board, either in person or by attorney, and questioned as to the statements set forth in the said petition of appeal; if, in the opinion of a majority of the board, it shall appear that the tax so levied as aforesaid is excessive or unjust, they shall thereupon require the officers of the corporation to file with the board a corrected return, and upon said corrected return the assessment shall be adjusted and the tax reduced or amended as in the opinion of the board shall seem proper."

"163. RIGHT OF APPEAL WAIVED AFTER THREE MONTHS.

"If the petition of appeal shall not be filed within three months from the date of assessment as aforesaid, *the right to appeal to the state board shall be considered and treated as having been waived* and the amount of tax levied shall be payable and collected as other taxes levied by said board."

Under Section 64 A, of the Bankruptcy Act, it is provided that the court shall order the Trustee to pay *all taxes legally due and owing* by the bank-

rupt to the United States, state, county, district or municipality, in advance of the payment of dividends to creditors, etc. It is under this section of the Bankruptcy Act, and under the aforesaid sections of the statutes of New Jersey, that appellant claims the right to payment in full.

It will be noted that the language of the New Jersey statute is not so clear and unambiguous as to create a tax by its terms. Thus, throughout the section in question, the words "license fee" and "franchise tax" are used interchangeably. Further, it appears that the charge is based entirely upon the *amount* of capital stock issued and outstanding at a certain time, regardless of the *value* of the stock, and regardless of the *quantity of property* which the particular corporation may then own. It appears further that the tax, when determined, *constitutes a debt* due from such company to the state, for which an action at law may be maintained after the same has been in arrears for a period of one month. The state is given *no other remedies* than such suit for the *collection* of the license fee, but may forfeit the franchise.

It thus appears, from these peculiar provisions, that the state does not itself consider that it is assessing or collecting *a real tax* and that it has not resorted to the usual and ordinary method of collection, which the sovereign exercises to collect taxes, namely, the creation of a lien upon property of the corporation, or the seizure and sale of property of the corporation, for the payment of such taxes. *On the contrary, the state expressly converts this charge into a debt,* to be collected by suit at law, and upon failure of the corporation to pay such

debt, takes away what it has given, and brings to an end the life of its creature by forfeiting its charter and franchise.

Much of the argument that has been made by appellant upon the question of whether this charge is a tax, is based upon the erroneous use of the words "tax" or "franchise tax" in speaking of a charge such as this. First as to the word "tax."

Cooley says, in his work on Taxation, p. 17:

> "Taxes are not contracts between party and party, either express or implied, but they are the positive acts of the government through its various agents, binding upon the inhabitants and to the making of which and enforcing of which *their personal consent, individually, is not required.*"

It is said that the word "tax" has been used at different times to cover every possible species of enforced contribution to the public treasury, but it is clear that such use of the word is highly untechnical, and that it has come, in a mistaken sense, to mean any charge exacted by the state or the sovereign, which is used for the public revenue regardless of whether such charge is the result of a bargain between the state and the citizen, or whether it is a sum demanded and collected in spite of the citizen.

In *State* v. *Western Union Telegraph Co.*, 73 Me., 527, the court said:

> "The word tax has at different times been applied to nearly, if not quite every, burden imposed on person, property or business, for the support of the government, and acts for raising revenue for public purposes, it seems

to be used as meaning the same thing as impost, duty or excise."

Again, in Cooley on Taxation, Vol. 1, p. 6, we find the following definition:

> "An impost is a duty laid on imported goods and merchandise, in a larger sense, *it is any tax or imposition.*"

Again, in *North Jersey City Ry. Co.* v. *Mayor of Jersey City,* 63 Atl. Rep., 83, decided by the Supreme Court of New Jersey, June 11, 1906, the court comments upon the looseness of the use of the term tax and says (quoting the Court of Appeals of New York):

> "Both in statutes and in judicial decisions, the term 'tax' is frequently used in a much more comprehensive sense than that which we have stated to be its accurate meaning. It is not used so broadly as to include the revenue from private property which the state or one of its political divisions may hold for emolument the same as other owners; but it certainly is used to comprehend *exactions for the privilege of exercising franchise rights which latter are often, especially in the case of foreign corporations, merely the consideration received for privileges which the state is at liberty to grant or to withhold, at pleasure.*"

This quotation was taken from the case of *Heerwagen* v. *Cross-Town St. Ry. Co.,* 179 N. Y., 99.

The same language was again quoted by this court in deciding *N. Y. ex rel. Metropolitan St. Ry. Co.* v. *Tax Commissioners,* decided May 29, 1905, and reported in 25 Supreme Court Rep., p. 705.

In that case this court further said:

> "We are not disposed to undervalue the force of these suggestions (referring to the language of the New York Court of Appeals just quoted), but it would be giving them undue significance to hold that they are bound to displace the power of the state to subject to the burdens of taxation property within its limits. The word 'tax' is not infrequently used in a general sense as denoting a burden or charge, and not in the strict legal sense of a charge or burden imposed by the state for the purposes of revenue for its support. Undoubtedly the payment for the franchise of an annual sum was a burden and in that sense it might not unnaturally have been spoken of as a tax. Being recognized as a burden, it may also well be that when the franchise itself was of comparatively little value the legislature did not see fit to subject it to the burdens of ordinary taxation. * * * These annual charges are not called taxes, but are spoken of as in the nature of a tax, and the legislature, recognizing the equitable force of the claim based thereon, provided that the corporation be given credit for sums thus payable."

The judicial meaning of the term "tax" seems to be an enforced proportional contribution from persons and property levied by the state, by virtue of its sovereignty, for the support of government and for all public needs. It is however such a contribution *as is demanded and required* by the state, regardless of the consent of the citizen. As the Circuit Court of Appeals said in its opinion,—"the state does not bargain with the subject, but commands,"—and in respect to a corporation the state does not *compel* a corporation to accept a charter, but in effect *bargains* with the incorporators to give

them certain privileges or franchises, *in exchange for certain payments.*

It has thus been seen, that the first reason for confusion in the language of the New Jersey statute in question lies in the use of the word, "tax," in referring to the license fee. Such a use is entirely unnecessary and adds nothing to the meaning of the phraseology. The words, "license fee," are quite as explicit and mean everything that the words "franchise tax" stand for. The latter words may just as well be stricken out of the sections in question, as their use does not assist in the construction or meaning.

The second point of confusion arises from the use of the words, "franchise tax." This expression also has grown to have many meanings. The franchise of the corporation is of two kinds, *to be* and *to do.* The franchise *to be,* concerns itself merely with the bare existence of the corporation. It is given the right to live as a citizen of the state which creates it. The franchise *to do* on the other hand is accompanied by the acquisition of tangible property, by valuable rights and privileges which can be passed on to transferees under proper conditions and for which the corporation can obtain in many cases large sums of money, in exchange. It is unnecesasry to cite examples to this court. These distinctions are elementary here and are thoroughly understood.

The Statutes in question do not attempt to levy a tax upon property, that is upon franchises to do, or upon valuable rights or contracts which are susceptible of pecuniary estimation. They seek only compensation from the corporation *for the right to live,* without in any way relating the amount of the com-

pensation to the *value of the corporate property.* There is no difference between this form of exaction and the other form in such common use, whereby states cause foreign corporations to pay an annual license fee for the privilege of doing business in a different state, than the one of its creation. In such case the corporation may or may not avail itself of the privilege, but if it does, it contracts to pay certain stipulated amounts annually.

Further, a careful reading of the Statutes in question discloses that the state does not seek to collect the license fee *out of property within its borders.* If it did, it would surely protect itself in an easy method of making such collection by lien, levy and sale. The Statutes are silent in this respect, but they provide for the transformation of the "tax" *into a debt,* and for the collection thereof by action at law.

The statutes making the license fee a debt should be controlling, so plain is their language. Where the state is placed on an equal plane with other general creditors, no tax can be created in the nature of things. It is elementary that a tax is not a debt.

It is said:

> "A tax, in its essential characteristics, is almost universally held not to be a debt or in the nature of a debt; the distinction between a debt and a tax is that the one rests upon contract and the other does not. A debt is a sum of money due by contract, express or implied, while a tax is a charge upon person or property to raise money for public purposes and operates *in invitum.*"
>
> Am. & Eng. Ency. of Law, Vol. 27, p. 580, and cases.

Lane County v. *Oregon*, 9 Wall., 71.
Merriwether v. *Garrett*, 102 U. S., 513, 514.

The charge in question is not enforced under the general revenue act of the state, and by a long line of New Jersey decisions, it is held not to be a tax on property. It is clear, therefore, that the characterization of the charge as a *tax* in the statutes itself, or as a *franchise tax*, means nothing when considered with reference to the real nature of the claim and that nothing can be argued as to its nature by reason of such nomenclature.

In the recent case of *American Smelting & Refining Co.* v. *Peo. ex rel. Lindsley*, 82 Pac. Rep., 581, the nature of a similar license fee was inquired into by the Supreme Court of Colorado, in the quo warranto proceedings brought against the corporation in question to forfeit its franchise by reason of its failure to pay the annual state license tax. After this corporation had paid all of the fees and license charges required by the state for the privilege of doing business in Colorado, the General Assembly, by a law passed in 1902, required the annual payment of an additional yearly license fee and it was this latter charge that the corporation refused to pay. There also the state was authorized to forfeit the charter in case of non-payment and this action was taken, and approved by the court below.

The court found that the charge in question was not a property tax but a "business tax" or excise, but when considering whether the assessment and collection thereof violated certain provisions of the state and federal constitutions, the court said:

"The fee paid to the Secretary of State for

the use of the state, when the certificate is filed, *is not in any sense a tax.* It is the conventional price or bonus which the corporation pays to the state for the privilege of entering its state to do business as a corporation, subject to all legitimate taxation which the state may impose upon the property that it may acquire in the exercise of its franchise rights and upon the use of the privileges thus purchased. The right or privilege to be a corporation is a franchise itself, often called a primary franchise, and while it was not this franchise which appellant obtained by the payment of the filing fee, because that had already been granted by the state of New Jersey, yet it was for the right to come into this state and do business, as a corporation, that the bonus was exacted. The secondary franchise, or right to make use of the purchased privilege, which the books denominate the franchise to do, is entirely distinct and separate from the franchise to be or to exist here as a corporation. These distinctions are recognized by the highest authorities."

In *Central Pac. Ry.* v. *Cal.*, 162 U. S., 91, the court says:

"The right and privilege or franchise of being a corporation is of value to its members, and is considered as property separate and distinct from the property which the corporation may acquire, and we add distinct from the franchise or privilege it secures to carry on the business which it was organized to transact."

The learned counsel for appellant have referred to many New Jersey cases for the purpose of impressing the court with the fact that the New Jersey courts have often *called* the imposition in question a tax, arguing therefrom that because so called, it is in fact a tax. We are unable to perceive the

value of this argument. Merely calling a thing for convenience by an arbitrary name does not in any sense change its essential nature. It is quite natural that such an exaction should in general terms be called a tax, because it is payable to the state at definite times and is used for public purposes. These facts, however, would in no way control its classification as a tax.

Unfortunately for counsel, the cases referred to as settling the question that the license fee is a tax, do not, in a single instance, decide the question in counsel's favor and in most cases do not attempt to decide the question at all. *Wherever it is decided in those cases, however, it is held that the exaction is not a tax in the real meaning of the term.*

Turning to the authorities cited, we begin with *State* v. *Evening Journal Association,* 47 N. J. L., 36. Counsel say this case holds the license fee to be a tax. On turning to the opinion, we find that the only question that the case pretends to decide, is that the Evening Journal Association *was not a manufacturing company,* within the meaning of the proviso of the fourth section of the Act of 1884, Chapter 159, which exempted manufacturing companies. among others, from the payment of the license fee. The entire opinion is taken up solely with that question, and nothing contained in it sheds any light upon the nature of the license fee as a tax. It is true that the opinion uses the word "tax" in referring to the exaction, but we submit that that is of no importance whatever.

In *Standard Cable Co.* v. *Attorney General,* 46 N. J. Eq., 270, the nature of the license fee was dis-

cussed. The complainant contended that the collection of the license fee in question, if it were held to be a tax, would be violative of the state constitution, which provided that property should be assessed for taxes under general laws and by uniform rules according to its true value. On this point the court said, page 273:

> "The fault of this position is the assumption that this tax is only upon property. Such manifestly is not the case. The law in question imposes a tax on certain corporations *by way of a license* for exercising corporate franchises. It is declared to be such tax by the act, and although it is laid on this class of corporations with respect to the capital stock, the tax possesses the legal quality of a *license* or a franchise tax. Upon the power of the legislature to impose such a tax, there exists no restriction in our constitution. As a *license* or franchise tax, it is not within the equality clause of the constitution referred to."

We submit that the court does not determine the exaction to be a tax, in its essential nature, but merely a license fee, called by the other term of "franchise tax." And it will be seen when discussing the *U. S. Car Co.* case, 60 N. J. Eq., 514, hereafter, that the court later determined that it was not in reality a franchise tax, but a bare license fee.

Turning to *Pipe Line Co.* v. *Berry,* 52 N. J. Law, 305, cited by counsel as indicating that it was considered a tax by the court, we find that the Pipe Line Company, a Pennsylvania corporation, complained *of a real estate tax,* because it had been obliged to pay the license fee in question. The distinction which the court points out in this case, between the license fee and the real estate tax in

question is that by the license fee revenue for the state was meant to be provided, while by the real estate tax revenue for local purposes was raised. But nothing contained in the opinion attempted to change the nature of the license fee into a tax, in the real meaning of the term.

In *Lumberville Bridge Co.* v. *Assessors,* 59 N. J. Law, 529, also cited by counsel, the corporation resisted the payment of the license fee. The court in passing upon the question whether the collection of the charge in question constituted a regulation of interstate commerce, quoted the language of *Railway Gross Receipts* case, 82 U. S., 284, saying:

> "Every tax upon personal property or upon occupations, business or *franchises,* affects more or less the subjects and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it within the meaning of the constitution."

And the court further said, commenting upon that language:

> "This language is quoted not because the word *'franchise'* is there used in the precise sense to be presently ascribed to it, but for the purpose of showing that the payment for a state privilege may exceedingly affect commerce without being in a constitutional sense a regulation of it. The franchise that is taxed as property is the privilege enjoyed by a corporation of exercising certain powers derived from the state, whereas the franchise with which we have to do is the right to exist in corporate form, without reference to the powers that under such forms the company may exercise. This distinction, although formulated by Mr. Justice Field in *Home Ins. Co.* v. *New York,* 134 U. S., 594, was not strictly adhered to in his sub-

sequent expressions, probably because there was nothing in that case to call for a nice use of terms. In this state we tax each *of these so-called franchises.* The former, as in the case of the right to own and operate a railroad, is taxed as property having a true value, which it is the duty of the state board to ascertain for the purposes of constitutional assessment. On the other hand, the naked right of existing in corporate form is taxed as in the case before us, not at its true value, as it would have to be if it were property, but at a sum arbitrarily imposed by the legislature, *as an annual fee,* the amount of which is to be computed by reference to the capital of the company as a criterion."

It will be seen that the court therefore refused to consider this charge as an annual franchise tax, but called the payment an *annual fee.* Will it be said that this classifies the exaction as a tax? And yet this is one of the cases that counsel rely on in their statement that the New Jersey courts hold the fee to be a tax.

It would therefore be quite as logical to claim that all moneys which the state collected and which went into the public treasury, were taxes, *simply because they went for the payment of governmental expenses,* as to say that the exaction here in question is a *tax,* merely because it is *called a tax* in the statutes. The use of that term by itself means nothing.

Now the State of New Jersey has often had occasion to contend that this license fee or franchise tax was not in fact a tax, and also that it was a tax. Where the State attempted to collect such a license fee and was resisted in the attempt by the

corporation, upon the ground for instance, that the corporation had a special charter which exempted it from any but specified taxes and impositions, the State has contended that the license fee was not a tax or impost.

Hancock v. *Singer Mfg. Co.*, 62 N. J. Law, 289.

And, again, in other cases, where the corporation claimed that the charge was illegal because it constituted a tax on property, the state has claimed that it was not a tax on property, and has persuaded its courts to so hold.

Standard Cable Co. v. *Atty. General*, 46 N. J. Eq., 270.

So, also, in *In re Danville Rolling Mill Co.*, 10 A. B. R., 327, the state attempted to obtain priority in bankruptcy on a similar license fee and to avoid the force of the *U. S. Car Co.* case, holding the claim *not a tax*, argued that the license fee arose *on an implied contract*. How does that argument assist the state here on a claim that it is a tax?

The cases in bankruptcy, which have arisen under the Act of 1898, relative to the construction of Section 64 A, have been very few. Two of the cases are diametrically opposed to each other upon the very question involved in the case at bar. Thus, in *In re Danville Rolling Mill Co.*, 10 A. B. R., 327, decided April 3, 1903, by the United States District Court of Pennsylvania, the State of New Jersey made a similar claim in the bankruptcy proceedings, for priority and Judge McPherson denied it upon the ground that by the decision of the Court of Errors and Appeals of New Jersey, in *In re U. S.*

Car Co., 60 N. J. Eq., 514, it was held that the license fee or franchise tax *was not a tax at all*, and that therefore the State could not be permitted to claim in any other forum the unusual boon of priority for the demand as a tax. The court says:

> "The learned Referee was right, I think, in disallowing the claim of the State of New Jersey, founded upon its Revenue Act of April 18, 1884, for a license fee, or franchise tax, for the year 1901. The Court of Errors and Appeals of New Jersey, in the *U. S. Car Co.*' case, 60 N. J. Eq., 514, has used this language concerning the annual sum exacted from corporations under the provisions of this statute: '*Although the statute designates an imposition of this kind as a license fee or franchise tax, it plainly is not a tax at all, nor has it the elements of one.* It is in reality an arbitrary imposition laid upon the corporation, without regard to the value of its property, or of its franchises and without regard to whether it exercises the latter or not, solely as a condition of its continued existence.' In the State of New Jersey, therefore, the sum in dispute is not a 'tax,' and accordingly can not be allowed under Section 64, clause (a) of the Bankrupt Act. For, after a declaration by its highest court, that the annual charge was not a tax, properly speaking, the State could not be permitted to claim, in another forum, that the charge was nevertheless included in the language of the Bankrupt Act, that requires the trustee to pay 'all taxes legally due and owing to the United States, state, county, district or municipality.' "

Again, in *In re Ott*, 2 A. B. R., 637, decided by the District Court for the Southern District of Iowa, July 5, 1889, the mulct tax of Iowa was construed and the claim of Scott County therefor was denied priority. In that case the legislature had surround-

ed the tax with every apparent incident going to make it in fact a real tax. Thus, it provides for the levying of the tax, and its collection by the treasurer in the same manner that other delinquent taxes are collected, for the sale of the personal property used in connection with the business or of the real estate where the business is carried on,—it provided that all the provisions of law as to tax sales should apply to such sales made for delinquent mulct taxes and that the taxes collected should be paid into the county treasury. Every incident of taxation seems to have been given to the mulct tax in question. The statute *denominated it a tax,* spoke of it throughout *as a tax* and provided for its assessment and collection by the same officers performing like duties as to taxes generally. *Finally it was given the same lien as other general and special taxes.*

The court, however, turned to the opinions of the Supreme Court of Iowa, and found that in *Smith* v. *Skow,* 97 Iowa, 640, where there was a contest between a mortgage and the lien of the mulct tax, the Supreme Court held that it did not constitute a tax as the court used that word.

> "It matters not that the legislature, in the statute, speaks of this license or charge as a 'tax.' That does not make it a tax. It is in reality a charge or license exacted for the privilege of carrying on the business of vending liquors, which charge is made by statute a lien upon all property, both personal and real, used or connected with the business."

The court therefore considered that it was bound by the decision of the Supreme Court of Iowa, to the effect that the mulct tax was not a tax, and refused priority to the claim of the county, saying:

"It is not for this court to contest such decided fact. The State, by its proper authorities, legislative and judicial, has enacted the statute creating or levying a tax, and then construed and determined the force and effect of such statute, and this court, after the Supreme Court of this State has construed it, accepts such statute as though such construction had been placed in the statute at the time of its enactment. If the statute had expressly declared that, although called a 'mulct tax,' the penalty or tax (or whatever the statute named it) was not in fact a tax, but only 'a charge or license enacted for the privilege of carrying on the business of vending liquors,' this court must coincide with the statute, and regard it, not as a tax, but merely as 'a charge which attaches to, and becomes a lien on, the real estate,' etc. Again, it is not for this court, but rather for the State, through its supreme lawmaking body, to declare that a claim that may thereafter exist in its favor shall be a tax or not. Unless the State so shapes and legislates with regard to such claim as that it becomes a tax, and not a mere charge, this court may not attempt to supply whatever, in the judgment of the Supreme Court of the State, may be required to make it a tax. *The bankruptcy statute certainly intended this priority of payment should be given only to those claims existing in favor of the State or municipal corporations, which the State had clothed, not only with the garb, but with the actual nature, the 'in reality,' of a tax.* This court, therefore, must decline to give to the claim presented greater force or effect than the State has itself declared the claim shall possess."

But in *In re Mutual Mercantile Agency*, 8 A. B. R., 435, where the State of New Jersey filed a similar proof of claim for priority, the Referee followed the *Ott* case (*supra*), in so far as it declared that the

Bankruptcy Courts should follow the construction given by the highest court of the state to the question of whether the claim was a tax in fact, but found that in *Hancock* v. *Singer Mfg. Co.*, 62 N. J. Law, 289, the Court of Errors and Appeals of New Jersey had decided that the franchise tax was in fact a tax, and the Referee ordered that the state should be allowed the claim as a priority.

It will thus be seen that these two cases proceed upon the irreconcilable theory that at one time the State of New Jersey considers the claim in question a tax, and at another time it takes the position that the claim is not a tax. Upon examination of the two cases, however, it is readily seen that the conflict is more apparent than real and that the state does not indeed consider the claim as being in its essential nature a tax.

The *Singer* case presented only the construction of an exemption clause in the charter of the Singer Manfacturing Co. This exemption provided that the real and personal property of the said corporation, not actually and in fact within the State of New Jersey, and the stock of the said corporation held or owned by any of its stockholders, should not be liable *to any tax or imposition whatsoever.*

The same question had arisen for the first time in 1891, reported under the name of *Singer Mfg. Co.* v. *Heppenheimer,* 58 N. J. Law, 634. In an opinion there rendered by Judge Van Syckel, it was said that the question to be solved was, whether that part of the charter constituted an irrepealable contract with the state, and if it did, *whether the imposition of the license fee violated such contract.* The court held that the contract was irrepealable and that the word

"*impost*" used in the charter *included every kind of enforced contribution to the public treasury.* The court found that the object of the exemptions clause was to prevent the state from levying an indirect imposition upon the property of the company aforesaid by the state, because it was well understood that the state could not impose a direct tax upon property located beyond its jurisdiction. The court said:

> "It is an attempt to do by indirection what it is agreed in the contract shall not be done. The fact that it is styled *a franchise tax* can not validate it. It is none the less an interdicted imposition because it is given a new name. The franchise of the company is the right to hold property and exercise its corporate privileges. All those rights and privileges were granted to the company by its charter upon the terms specified in it. Those terms can not be changed or altered without the consent of both parties to the charter contract."

In 1897 the State of New Jersey again attempted to collect the franchise tax from the Singer Mfg. Co., and the corporation was again obliged to defend itself from this attempt. That case is reported as *Hancock* v. *Singer Mfg. Co.*, 62 N. J. Law, 289. The case was argued most fully and by eminent counsel. The point upon which great emphasis was laid in the argument was that *all of the questions involved had been previously litigated in the Heppenheimer case* (*supra*) *and that the court could not reconsider it.* Further, it was argued that the charter exemption clause was broad enough to cover such a demand as the franchise tax or license fee.

Judge Van Syckel again wrote the opinion of the

court, and reiterated his language used in the *Heppenheimer* case. He found that good faith on the part of the state required the performance of the contract not to impose *any other charges or burdens of any kind* upon the corporation, and he said, page 333:

"The state pledged exemption not from taxation only, *but from any imposition whatsoever.*

"Much of the brief on the part of the state is devoted to proving that, at the time the Singer charter was granted, the accepted meaning of the word 'impost' was 'a tax or tribute or levy upon goods brought from out of the state or country into it,' and the familiar rule was invoked that after a practical construction has been given to language by judicial decision, it will be presumed that it has been adopted with the meaning so given to it.

"The imposition resisted by the company in this case is laid upon the entire capital stock of the company of $10,000,000, less the value of its real and personal property in this state, and is in effect as much an impost on property out of this state as if it were put directly upon property itself and not upon the capital which stands for and represents it. It is an attempt to accomplish by indirection what it is stipulated shall not be done. It is an effort to levy a franchise tax out of the many millions of dollars of its capital invested by the company in real and personal property outside of this state.

"The act of 1884 (Pamph. L., p. 232) is entitled 'An act to provide for the imposition of state taxes upon certain corporations and for the collection thereof.'

"In that act this imposition is called a yearly license fee or tax.

"In a supplement passed to the act of 1884 (Pamph. L., p. 136) it is called 'an annual license fee or franchise tax.'

"It is wholly immaterial what name may be

given to it. The fact that it is called a 'license fee' or 'franchise tax' can not validate it. It is levied under an act passed 'to authorize the imposition of state taxes,' *and it is none the less an interdicted imposition,* and none the less a tax because it is given a new name.

"Although under our adjudications it is not a tax on property in a sense which brings it within article 4, section 7, paragraph 12, of our state constitution, it is a tax on the capital stock of the corporation. Otherwise the act would be manifestly void for want of a title expressing its object, and the state would be deprived of all its revenue under the act of 1892. The franchise of the company is the right to hold property and exercise its corporate privileges. The Supreme Court of the United States has decided that where a corporation is exempted from taxation, it is not subject to a tax on its franchise. *Wilmington Railroad Co.* v. *Reid,* 13 Wall., 264.

"All the rights and privileges which the company is empowered to exercise were granted to it by its charter upon the terms therein specified. Those terms cannot be changed or altered without the consent of both parties to the charter contract. *The right to make further exactions from the company under any pretext* involved the power on the part of the state legislature to render the grant to the company futile and of no value, by impositions of like character, to such an extent that the business of the company cannot be prosecuted with profit to the shareholders. That an impost laid upon the entire capital stock is a burden on each share into which such capital stock is divided, in the hands of its several holders, is too clear to be doubted. The proposition that an imposition may be laid upon the aggregate of the capital stock, which is expressly forbidden to be levied upon the several parts which constitute the whole thereof, is so absolutely devoid of merit that it cannot be assented to."

And, again, Judge Vredenburgh, in his separate opinion, page 341, says:

> "The Act of 1892 in question demonstrates the present exaction of a license fee or franchise tax, and it is imposed for the purpose of revenue upon the occupation of the company in general, and without restriction to any locality. It is not a tax assessed upon any basis of valuation of the property of the company, but is arrived at annually by the mere multiplication of the amount of the company's issued capital stock by the arbitrary per centum fixed in the act."

And on page 343:

> "Under the tax classification adopted by this court in the case of *Standard Underground Cable Company* v. *Attorney General,* 1 Dickinson's Chancery Reports, 270, the assessment in question, *speaking in the strict constitutional sense,* must be defined to be a franchise tax as distinguished from a property tax. This as a legal definition, must be accepted as correct, but while a franchise tax is not one levied directly upon property, and is not, therefore, to be named a 'property tax,' it is, when imposed in substantial sums for purposes of revenue as in the present instance, a tax burden upon the income of property. Unless we follow the name and shadow merely, and lose sight of the substance of things, the intent of the parties, in the use at the close of the exemption clause, of the comprehensive words, viz., 'shall not be liable to any tax or impost whatsoever,' is as clearly expressed as if they had instead appended thereto the words, 'whether such tax or impost be ascertained in the form of an assessment upon the value of such property or in the form of a franchise tax, fixed by a percentage upon the capital.' In either case the governmental burden to be borne by the com-

pany and paid out of the earnings of the property for the privilege of using it to carry on its extra territorial business will be increased, and its net earnings decreased to that extent, in disregard of the real intent and just expectation of the contracting parties."

And, again, page 344:

"The exaction annually of this license fee of $4,212 by the compulsory power of the state though not in form a tax upon the property of this corporation outside of this state, is, in fact, a burden upon the annual earnings of that property, and must of necessity be paid out of them either in whole, or, if not, certainly in large part, and thus falling on them is, *in a manner, as we have above argued, a tax upon that property*, and to such extent, at least, 'abridges' the intention of the parties."

The findings of the court upon the question of whether the license fee was an impost or tax was *totally unnecessary to the decision* in view of the positive conclusion of the court that the state was foreclosed by the former adjudication. Furthermore, the parties were in a court of equity and with the clear intention to exempt the corporation and its property *from charges or exactions of any kind* outside of those previously agreed upon, it is not surprising that the court should hold that a license fee whose payment could be enforced by forfeiture of the charter and by the appointment of a receiver was an impost, or in other words, *was an enforced contribution to the public treasury.* The *Singer* case, when carefully considered and analyzed, furnishes but small comfort to the appellant, especially when read in the light of the separate opinion of

Judge Vredenburg holding that the imposition is *"in a manner, a tax."* We submit that any other exaction, whether it had been imposed under the name of a tax, fee, charge, exaction or whatsoever, would have fallen equally under the ban of the court, in view of the special provisions of the Singer charter as did this "license fee or franchise tax," because any other form of charge or imposition would have equally been payable out of the capital or income of the company, and hence would have fallen upon its stockholders ultimately, in the same way that the license fee was held to, in that case.

But the court expressly refused to decide the case upon the question whether or not the license fee was a tax, and rested its final decision upon the proposition that the *Heppenheimer* case disposed of the question and that it would not permit the state again to re-open and re-argue the same questions. The court says, page 340:

> "In the case reported in 29 Vroom., the conditions and questions to be solved were identical with those here presented, the only difference being that in this case the tax is for a subsequent year. Unless the question involved is *res adjudicata,* it can never become so; the unsuccessful litigant may year after year continue to vex his adversary and the court with the same questions which have been decided.
>
> "The attempt now to reopen questions which have been once adjudged by this court, by trying to enforce a subsequent tax of the same character, should not be contenanced. It is contrary to the traditions of this court; no precedent can be found for it from the foundation of this court to the present time.
>
> "The judgment of this court must be re-

garded as a finality. It is established to review the decisions of inferior courts and discontented suitors cannot invoke its aid to review and set aside its own deliberate judgments.

"The questions sought to be reopened in this case should be regarded as closed and no longer a subject of controversy between these parties, and in accordance with the former judgment of this court the judgment of the Supreme Court, setting aside the tax against the company, should be affirmed."

While the state of New Jersey stands at this bar demanding the payment of the license fee as a tax upon the assumption that it has been declared to be a tax by its own highest courts, we find, upon turning to the briefs filed by the state of New Jersey in the case of *Hancock* v. *Singer Mfg. Co.*, 62 N. J. Law, 295, *that the state earnestly and ably argued in its briefs in that case that the charge was not a tax, and was not an impost, but that it was a mere license fee.* The title of that portion of the brief of the state is stated on page 292 as follows: *"An exemption from tax or impost does not include license,"* thereby clearly indicating the position of the state to be that the license fee in question was not a tax. Again, the state said in its brief (p. 295) that Mr. Justice Van Syckle had declared the exaction to be a *franchise tax,* and that the act itself called it a *license fee;* that the original act of 1884 called the contribution *a license fee or franchise tax;* that the courts of the state had upheld its constitutionality on the ground that it was *not a property tax,* and said:

"A lax use of the term *'tax'* obtains in the expression 'license tax,' tax meaning in this

> construction the pay part of the license, quite as a man would say, 'My butcher *taxed* me too much for my roast.' Such use makes a license tax mean a license to sell something on paying the fee."

Again the state says, page 295:

> "*A license differs from a tax* in that it consists of a right granted by competent authority to do an act which, without such authority, would be illegal as distinguished from a mere rate or sum of money assessed upon the person, property or business of the citizen."

Throughout its brief the state emphasized the point that this charge or contribution *was not a tax, nor an impost, but a mere license fee,* payable as a contractual obligation, not in the nature of a tax, but in the nature of a bargain made between the state and the corporation. It is true the state was defeated upon the merits of the case, but as we have pointed out, the reason for the defeat was that the court considered *any charge or contribution exacted* by the state as unconscionable and uncollectible, in view of the clear provisions of the language of the exemption clause in the charter, and further, that the same question had been previously litigated and decided in the *Heppenheimer* case. We therefore maintain that nothing in either the *Heppenheimer* or *Hancock* cases justifies the assertion of counsel that the question decided in either case was whether or not the license fee was a tax.

It will thus be seen that neither the *Heppenheimer* case nor the subsequent *Hancock* case involved what counsel assumes. *These cases did not*

decide whether or not the license fee was in reality a tax. In both cases the State of New Jersey was obliged to contend and did contend *that the license fee was not a tax.* The admission by the state that it was a tax would have been fatal to its contention that the exemption clause of the Singer Mfg. Co. was not invaded by the levying of a license fee. The court, however, decided the *Heppenheimer* case upon the proposition *that any imposition, regardless of its name or nature, which the corporation was obliged to pay to the state, was an invasion of the exemption provision.* In the second *Singer* case, the court reaffirmed this contention, but decided the case upon the proposition that all of the issues had been disposed of in the first *Singer* case, and that to reopen them would be violative of every precedent and tradition of the court.

Eight months after the last *Singer* case had been decided, the Court of Errors and Appeals handed down an opinion in *In re U. S. Car Co.,* 60 N. J. Eq., p. 514.

In that case a corporation, chartered by New Jersey, became insolvent. The receivers rejected the claim of the state for a franchise tax, and had not in their hands sufficient to pay the debts of the corporation. It was argued that the receivers had not conducted the business of the corporation, nor exercised any of its franchises. The question presented for decision was, whether the state was entitled to priority in payment of the franchise tax, out of the assets in the hands of the receivers. The Chancellor held, that the tax was not payable in

advance of the claims of creditors, upon the theory that the franchise was a valuable asset to the receiver and that therefore nothing could be due to the state. The Court of Errors and Appeals, however, reversed the decree below, saying:

> "We cannot concur in this view. *Although the statute designates an imposition of this kind as a license fee or franchise tax, it plainly is not a tax upon corporate franchises. In fact, it is not, strictly speaking, a tax at all, nor has it the elements of one.* It is in reality an arbitrary imposition laid upon the corporation, without regard to the value of its property or of its franchises, and without regard to whether it exercises the latter or not, solely as a condition of its continued existence. The state, in creating a corporation, has the right to impose upon its creature such conditions as the legislature, within constitutional limits, may deem proper, and the acceptance by the corporation of the franchises, powers and privileges conferred upon it binds it to the performance of those conditions so long as it continues to remain in possession of those franchises, powers and privileges, and the conditions themselves remain unrevoked by the legislature. And this is so without regard to the solvency or insolvency of the corporation, the value or want of value of its franchise, or whether or not it is exercising them, either by its officers and directors or through a receiver. The sole test, in determining its liability to comply with those conditions, so long as they remain unrevoked, is the existence or nonexistence of the corporation.
>
> "Applying this test, it is quite clear that *the so-called tax* was properly imposed in the present case. At the time of its imposition, although the company had been decreed to be insolvent, no decree of dissolution had been pronounced against it, but, on the contrary, its corporate

life was continued for the benefit of its creditors pending the final distribution of its assets.

"But it is contended on behalf of the receivers that even if it be considered that this '*tax*' was properly laid, still, by force of the statute under which it was assessed, it became 'a debt due to the state when determined,' and that, as it was not 'determined' until some months after the receivers were appointed, it was, distinctly, not a debt of the corporation at the time of their appointment, and consequently is not payable out of the assets in their hands, for the reason that, by their appointment, such assets were converted into a trust fund for then existing creditors. In support of this contention *Hollins* v. *Brierfield*, 150 U. S., 371, and Cook, Stock. (4th Ed.), Sec. 9, are cited.

"It seems to us, however, that this contention can not prevail without disregarding the statutory provisions which regulate the subject. Section 6 of the act under which this *so-called tax* is laid declares, as has already been stated, that *such tax shall be a preferred debt in case of insolvency*, and Sections 68 of the Corporation act (P. L. of 1896) provides that 'all the real and personal property of an insolvent corporation, and all its franchises, rights, privileges and effects, shall, upon the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto.'

"It is manifest, therefore, that when the '*tax*' is assessed against an insolvent corporation, after the appointment of a receiver, the fund out of which its payment must be preferred is that which is in his hands, for there is no other fund upon which it can be charged, and, consequently, in no other way can each of these two statutory provisions be given full force and effect.

"The decree appealed from should be reversed, and the receivers directed to pay into

the state treasury the amount of the disputed tax."

It will be noted that the court investigated the real nature of the license fee and interpreted it. Moreover, this interpretation was made in a case where no other question arose and at least eight months after the decision of the case which appellant so earnestly relies upon. The distinction pointed out by the court lies in the fact that the license fee is in no way a tax on the corporate franchise—that the name "franchise tax" was wrongly given to it in the statutes—that it is a *mere arbitrary license fee and not a tax at all.* It was argued in the case that, being a franchise tax, it should not be enforced where the franchise was not used. But the court says it must be enforced regardless of the user *because it is not a franchise tax.* It is merely a *license* to live, and while life remains the charge must be paid under the clause which gives it preference in the event of insolvency. Moreover, wherever the tax is spoken of in the opinion of the court it is either as the *"so-called tax"* or it is put in quotation points to emphasize that the court does not consider it a tax, but refers to it as such because the statute does. Thus the question of its nature was squarely before the court and squarely decided.

Appellant's counsel say that the subsequent case of *Myers* v. *Campbell,* 64 N. J. L., 186, cites the *Singer* case approvingly. This is a totally misleading statement. The opinion shows that the *Singer* case is cited on the point that for the purpose of taxation, corporate property may be represented by

the corporation itself as legal owner, or by the corporate stockholders as beneficiaries. The citation is used for no other purpose and has no value at all in reference to the case at bar.

It is clear, that the State of New Jersey has solemnly asserted, through its highest court, that the franchise tax or license fee is not a tax, and has no element of a tax. It would seem unusual, to say the least, for a court of bankruptcy to insist upon paying as a priority a claim which the highest court of the state in its last deliberate opinion upon the subject has declared to be not entitled to such preference. But the courts of New Jersey, since the decision of the *U. S. Car Co.* case, have again referred to the license fee in *New Jersey Street Ry. Co.* v. *Mayor of Jersey City*, 63 Atl. Rep., 83, decided by the Supreme Court of New Jersey, June 11, 1906, where certain taxes which had been levied were set aside. The franchises which had been taxed in that case were the franchises to do, and the court, after considering whether or not under the Voorhees Act of 1900, the franchise of the corporation had been taxed, held that the franchise tax there mentioned was not intended to be a property tax, and said:

> "That impositions of this character may be imposed by way of a license tax is well settled. Such a tax is imposed by this state upon the general franchise to be a corporation and has been sustained by the courts. (Citing numerous cases.)
>
> "*The grant of the privilege to be a corporation rests in the discretion of the state, and may be made upon such terms as the legislature sees fit to impose. Those terms are open to acceptance or rejection. In this respect, the special franchise to use the streets does not*

differ essentially from the general franchise to be a corporation. It can not be doubted that the legislature or a municipal corporation vested with power to grant or refuse its consent to the special privilege to use the streets, may grant the privilege upon terms. In such a case the imposition may be regarded as in the nature of rent or purchase price for the privilege; but it may also be regarded as in the nature of a tax subject to change by the legislature. * * *

"Whether valuable as property or not, the franchise is to be exercised upon such terms as the state may determine, and it is no objection that those terms take the form of an annual license tax. As a license tax, it is not subject to the constitutional requirement that property shall be assessed according to its true value."

The offer and acceptance, with the payment of a consideration, are the indicia of contract, not of tax. The court would not have spoken thus of a real tax.

Thus we see that the New Jersey courts have consistently adhered to their position that the license fee in question is not a tax. They distinguish it from a tax in that the corporation has an option of accepting life from the state on the terms proposed, or of rejecting the proffer; in other words, there are all the elements present of a contract in an offer and acceptance, parties and subject matter, and we find no element of a tax. True, the money thus paid goes into the public treasury, and is used perhaps for public purposes, but that is true of all sources of revenue. The principal attribute of a tax is that it never becomes a matter of offer and acceptance or of agreement by the citizen, but con-

tinues to be levied and collected, *in spite of the citizen, not as a debt, and not under an express or implied contract.*

In many states of the Union the incorporators pay a lump sum to the state for the franchise *to be,* at the time the charter is issued. Such payment would not in all likelihood be a sufficient defense against the payment of an additional annual license fee, if subsequently the state lawfully were empowered to collect it. But in New Jersey, instead of the lump sum payable at the time of incorporation, there is a different method of payment insisted upon by the state—namely, the division of such lump sum into an annual license fee, payable during all the time the corporation enjoys the franchise *to be.* The incorporators say to the state, in effect: "We prefer to receive our right to exist from you, because of advantages which your laws offer us, and if you will grant us a charter we agree to pay you the annual license fee which you demand by such laws as now exist or as they may hereafter be changed." The state, on the other hand, says, in effect: "If you desire to receive from us the right to live and the right to share in the advantages of our corporation laws, you must pay us a license fee for each year of your life for that privilege, and continue to pay such charges as we may require either now or hereafter therefor." Now, in consideration of the making of such an agreement by the corporation with the state, the latter issues a charter and permits the corporation to enjoy such advantages as the peculiar laws of that state may give to such bodies. It is a clear

contract, and nothing else. It is no objection to this view that the state may increase the annual price, and that the corporation could not refuse to pay the increased price without forfeiting the right granted, because the contract is one whereby the corporation impliedly agrees *to pay the present license fee, or any other or changed license fee.*

In endeavoring to establish their proposition that this is a tax, counsel for appellant take the ground that it must be a tax because it cannot be a contract, and in elaborating this theory they contend that it cannot be regarded as a contract, because the state has power to change the amount of the annual license fee, and their claim is that it is fundamentally inconsistent with the theory of a contract that one party should have any power of changing its terms after it has become operative.

Without entering into a general discussion of this claim as applicable to all kinds of contracts, we submit that it can have no application in the case at bar, and that it is perfectly consistent with the theory of a contract, and with the application of that theory to the question here involved, that the legislature should possess this power. We have not here a case of an unlimited power by one party to so change the terms of the agreement as to put the other party at his mercy, or to make such changes as would destroy the nature of the agreement. Provisions in a contract by which the amount to be paid is to be changed in the future, upon the decision of some third party, are quite common. In the matter of this license fee the corporation is dealing not with an ordinary contracting party, but with *a*

state. The state can make no change in the license fee except by legislation. Such legislation is passed by representatives of the people, in the selection of which all citizens have a voice, and who presumptively exercise their legislative power with reference to the good of the community as a whole. In addition to this a change made by legislation could not be a change made in the license fee to be paid *by a particular corporation*, for such a change would be unequal and unconstitutional. The change, if made, *must be equal and apply generally to all corporations or persons* who fall within the class embraced by legislation. For these reasons we submit that it is no objection to regard this license fee as resulting from a contract with the state, and creating just what the statutes say it shall create, a debt, that the legislature, which as a representative of the state has given the right, may change the amount to be paid in the future, and that the other contracting party, the corporation, had agreed that this may be done. If, when the change is made, the corporation does not desire to pay the increased rate, it may surrender its charter and thus escape any personal liability. Thus the state as a contracting party is not given an unlimited power to impose a greater and a further debt upon the corporation in the future, but only the power to increase the price which the corporation shall pay, if it desires, in the future, to continue the corporate rights which are given to it.

Besides, in New Jersey, under Sec. 4 of the Corporation Act, the charter of every corporation is subject to alteration, suspension and repeal, in the

discretion of the legislature; and by Section 5 the act under which corporate life is given may be amended or repealed at the pleasure of the legislature, *and every corporation created under such act shall be bound by such amendment.* The charter is a contract and the price to be paid therefor by the corporation arises from a contract and is a contractual obligation, subject to the reserved right of the state to alter the annual charge in a lawful manner.

The learned Circuit Court of Appeals, in deciding the case below, was forced to the conclusion that the language of the *U. S. Car Co.* case was not *dictum*, but was clearly applicable to the essential nature of the license fee, and that the question properly arose in the case and its decision was binding as the final decision of the highest court of the state, declaring the imposition not to be a tax. It is difficult to see upon what theory the state can avoid the unambiguous, decisive language of that case, especially when no case decides the charge to be a tax.

In the *Danville Rolling Mill Co.* case, 10 A. B. R., 327, it is plain that the district judge who wrote the opinion was persuaded that the *U. S. Car Co.* case was decisive and that there could be no question under that case, but that the claim of the state for preference must be denied. In the *Mutual Mercantile Co.* case, decided by Referee Allen, following the *Singer Mfg. Co.* case, it is clear, upon turning to the opinion, that the *U. S. Car Co.* case was never brought to the attention of the referee, and that neither the counsel nor the court knew of the existence of the later decision. Certainly, if the

later case had been called to the attention of the court, some attempt would have been made in the opinion to distinguish and to point out why the court should follow the earlier case, especially as the *Singer* case did not decide the question involved, but no such differentiation is pointed out, nor is the later case in any way referred to.

Should it become a question between two conflicting decisions of the highest court of the state, the preference would undoubtedly be accorded to the last decision of the court, on the theory that in making its last pronouncement the court must have had in mind the earlier case, and must have decided to depart from the earlier doctrine. But the Federal courts will not decide for the state that the imposition in question is a tax, *where the state has itself decided that question in the negative,* and if the state is itself *unable* to say, because of conflicting decisions, whether the charge is or is not a tax, surely the Federal courts will not decide such a question in its favor, where the effect of such a decision would be to give the state an unusual privilege *and to deplete the bankruptcy fund at the expense of the general creditors.* As was said by the Circuit Court of Appeals below:

> "It is not for the United States bankruptcy courts to insists upon the state's receiving as a tax under Sec. 64 (a) something which the state declares is not."

Even if the legislature of the state had declared the charge to be a tax, and the courts of the state in construing it had agreed therein mistakenly, the United States bankruptcy courts would not be

obliged to follow such error. The Federal courts in such a case will agree to the construction of the highest court of the state, where the construction is such a one as appeals to the reason of the court; but where application is made *under a federal act* for the payment of moneys to the state, out of funds in the hands of a trustee in bankruptcy, *to the detriment of general creditors, and as a preference to the state,* the question of whether the claim advanced comes within the class *is one for the court of bankruptcy to decide.* The statute says that the court shall order the trustee to pay all *taxes,* clearly meaning *all claims which are in reality taxes,* and not merely called by such name. If the highest court of the state has said that the claim upon which preference is demanded is not a tax, that ought to be sufficient for the bankruptcy court, and a denial of the claim to priority would follow. If the highest courts of the state have mistakenly said that the claim is a tax, it would not be final and binding upon the bankruptcy court in such a way as to preclude the independent investigation required in the language of the statute. The Circuit Court of Appeals said:

> "But if we are mistaken, and if the *Singer Co.* case is to be accepted as an authoritative decision that the charge in question is a tax, we do not believe that the United States bankruptcy courts are bound to follow it blindly. The question with them is the interpretation and application of Sec. 64 a. If the legislature of a state gives the name tax to an exaction which is not a tax, and if the courts of a state join in the misnomer, surely the bankruptcy courts are not required to disregard the substance of the thing, to the detriment of other

> claimants. The state courts may authoritatively expound the substance, and the federal courts will adopt such exposition; but whether the substance constitutes a tax or not is independent of the name. And, moreover, the latter part of Section 64 a seems to direct the bankruptcy courts to determine independently the legality of any such tax."

The court below thereupon determined independently that the license fee was a contractual obligation and not a tax. It seems impossible to add anything to its opinion, and we are satisfied that this court will find no reason to change the conclusion arrived at, in determining that the claim in question was not entitled to priority.

The License Fee for 1902 Was Properly Reduced.

In investigating the amount of the claim for 1902, it was found that the state had assessed the charge upon the total capital stock of $40,000,000, instead of upon the $10,000,000 issued and outstanding. The language of the New Jersey statute is, that the corporation shall state in its return the amount of the capital stock issued and outstanding on the first day of January and shall pay an annual license fee or franchise tax of 1/10 of one per centum on all amounts of capital stock *issued and outstanding.* The corporation is not required to pay in any event upon capital stock not issued and outstanding. The corporation is required to make a return, but in the event of failure to do so, the Board of Assessors is empowered to ascertain and fix the amount of the license fee in such manner as may be deemed by them most practicable. The bankrupt corporation

failed to make any return for 1902, and the assessors made a return *November 7, 1902,* on the basis of $5,750, representing $40,000,000 of capital stock. By Section 64 A, of the Bankruptcy Act, the bankruptcy court is authorized to determine *the amount* and *legality* of any such tax as may be presented for payment in full. This is a condition attached to the right of the taxing body to present its claim, and when it comes before the court with its claim, it admits the right of the bankruptcy court to investigate the *legality and the amount of such claim.*

And in pursuance of such power the referee found, and it is stipulated as a fact (Rec., pp. 8 and 9), that on January 1, 1902, $10,000,000 of capital stock was issued and outstanding. Upon this amount the license fee would have been $4,250, instead of $5,750. The court therefore reduced the claim by this amount. If the claim arose out of a contract, as all of the courts below held it did, there was no error in looking to the contract for the measure of the liability. If the claim was in fact a tax, the claimant in accepting the benefit of Section 64 A must accept the qualification placed upon such benefit and must consent, in presenting the claim for payment in full, to re-examination of the *legality and amount* thereof as an independent right of the bankruptcy court. There was, therefore, no error in reducing the amount of the claim for 1902 in strict accord with the requirements of the New Jersey statutes.

In the recent case of the *Trenton Heat & Power Co.* v. *State Board of Assessors,* 63 Atl. Rep., 1005, decided by the Supreme Court of New Jersey, June 11, 1906, the question involved was the right of the

Board of Assessors to levy the license fee on a larger amount of capital stock than actually was outstanding when the license fee was assessed. The court said:

> "It is contended by the learned attorney general that because of the default to make return the imposition by the state board is in the nature of a penalty, and that the prosecutor should not be relieved by the court in this proceeding. This question, however, seems concluded in this court by previous decisions" (citing numerous cases).

In the last case, *People's Investment Co.* v. *State Board,* 66 N. J. Law, 175, Mr. Justice Garretson, speaking for the court, says:

> " 'There is nothing authorizing the levy of any franchise tax *other than that upon capital stock actually issued and outstanding,'* thus intimating that while the state board may determine what the tax shall be, *they can only fix the amount to be assessed upon the capital stock that is actually issued and outstanding.* The tax here, being concededly laid upon more stock than was issued and outstanding, is in excess of the power to tax conferred upon the state board by the statute. *They can only tax that which by law is taxable. To tax more is beyond their jurisdiction."*

To the same effect did the court hold in *Arimex Copper Co.* v. *Board of Assessors,* 69 N. J. Law, 121.

Counsel would reply that to re-examine into the amount of the license fee would be a collateral attack upon it, not permitted. But the assessors acted ministerially, not judicially. They were permitted to assess the fee only on the stock issued and outstanding. That determination was merely computation.

When the claim is filed before the district court, the legality of the assessment is reviewable, *through independent legislation,* as a condition of any allowance. It would not be tolerated that the state should allow its own claim and exclude the Federal court from reviewing the correctness of the allowance. There is no question of collateral attack involved. The allowance of $5,750 was clearly wrong and beyond the power of the assessors and the reduction was right.

The Assessment for 1902 Was Void.

Again, even if the court should hold that the claim was a tax, and that it should have been allowed priority, there is cogent reason why the claim for 1902 should in no event be accorded any preference. The license fee for that year never became a valid charge against the corporation. Appellee, by reason of his failure to pray and take a cross appeal, is precluded here, perhaps, from being relieved of the 1902 claim as a general claim, but is not precluded from showing the court that the license fee for that year *is entirely invalid,* and that even if it is obliged to stand as a general claim *it should in no event be given priority.*

It is provided by the first section of Chapter 159, Laws of 1884, of New Jersey, that the annual return to be made by the corporation shall not be later *than the first Tuesday of May in each year.* By Section 5 it is provided that the assessors shall certify and report to the comptroller of the state, *on or before the first Monday of June in each year,* a statement of the annual license fee or franchise

tax, as returned by each company ascertained by the state board and the amount of tax due thereon, and such tax *shall thereupon become due and payable*, and it shall be the duty of the state treasurer to receive the same; if the tax of any company remains unpaid *on the first day of July*, after the same becomes due, *the same shall thenceforth bear interest at the rate of one per cent each month* until paid. The state board is given the power to require information and reports from the corporation and the production of the books, and may swear and examine witnesses. By paragraph 2 of the Supplement of April 8, 1897, it is provided that the corporation *may appeal within three months from the aforesaid date of assessment*, being July 1, and unless the petition for appeal is filed within three months the same shall be considered and treated as waived.

The provisions of the statutes aforesaid, requiring the assessment to be made on or before the first Monday in June are mandatory and not directory. They are for the benefit of the corporation. If the assessment is made later, the corporation would nevertheless be obliged to pay interest from and after the first day of July, according to Section 5 of the act. And the three months for appeal provided for by the supplement of 1897 begin to run from the first day of July. Substantial rights given by law to the corporation are rendered of no avail. The power of the Board of Assessors to make a return is limited to the period ending on the first Monday in June of each year. Section 5 provides that such tax shall *thereupon* become due and payable, meaning on or before the first Monday in July. If

no such tax has been ascertained and reported by that day, then none can become due and payable thereafter. If, for instance, the Board of Assessors are permitted to make their report and levy in November, instead of July, the three months granted by the act for an appeal would long since have expired, and the right of appeal would be gone. It is evident that the time limit upon the right of the board to report the assessment was fixed for the benefit of the corporation.

Such restrictions upon the powers of taxing bodies have usually been held to be *mandatory* and not directory.

Cooley, on page 286 of his work on Taxation (2d Ed.), says:

> "They (meaning the provisions of taxation referred to) are of the highest importance, because it is only by means of the requirement of official action in an orderly manner *and at periodical times,* that he (the taxpayer) can be protected against arbitrary and capricious action. * * * So all provisions designed to give him (the taxpayer) the opportunity of a review of the assessment, whether by the assessors themselves or on an appeal from their conclusions, are explicitly in his interests. Every notice which the statute provides for to that end, whether by publication or otherwise, must be given with scrupulous observance of all its requisites."

Thus it has been held that a tax voted by supervisors at a time when no meeting is authorized for the purpose is illegal because the direction as to the time of meeting is mandatory.

Beard v. *Sup.*, 51 Miss., 542.

Again, it has been held that the provision by which the Board of Equalization is to meet at a certain time and remain in session a certain period is mandatory, and that the board cannot empower two of its members to continue longer in session, and their act, if they do so continue, is void.

Wiley v. *Stournoy,* 30 Ark., 609.

For similar rulings in tax cases, regarding the time at which a report or certificate must be made, the Illinois courts, in *Mix* v. *People,* 72 Ill., 241, and *Cogill* v. *Lang,* 50 Ill., 202, have held such stipulations as mandatory.

Thus it is said by Cooley that when the requisitions prescribed are intended for the protection of the citizen and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, the provisions are mandatory and not directory. They must be followed, or else the acts done will be invalid. The power of the officer in all such cases is limited by the measure and conditions prescribed for its exercise, and reference is made to the opinion of Mr. Justice Field in *French* v. *Edwards,* 13 Wallace, 506.

In the case at bar the record shows (p. 15) that on *November 7, 1902,* the State Board of Assessors filed with the comptroller of the treasury their schedule No. 7, calling for $5,750 as license fee for 1902, from the banqrupt. Page 13 of the record contains a certificate of the secretary of the State Board of Assessors, setting out that the board did *on the 7th day of November, 1902,* levy and report the assessment in question. It is clear that upon

said date the board had no power or authority to report or levy any assessment, that the assessment so reported was void because the mandatory provisions of the statutes were not followed. While, therefore, the court below *should not have allowed any sum* whatever for 1902 license fee, appellee is not in a position to complain of the allowance, because of his neglect to take a cross appeal. But appellee is in a position to insist that since it appears that any allowance would have been treated as void if appellee had been in the position to insist upon it, no priority should be given to the allowance for 1902, since it would represent the payment of a *void claim.* Appellant has done very well to procure the allowance of any sum *as a general claim* for 1902 in view of the illegality of the assessment thus made.

II.

Even if the license fee should be held to be a tax, it is not such a tax as is contemplated by section 64 A, to be paid in full.

Sec. 64 A, of the Bankruptcy Act of 1898, provides in full as follows:

> "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

The language of the previous Bankruptcy Act of 1867, referring to the same subject matter, was:

> "In the order for a dividend, under this section, the following claims shall be entitled to priority or preference, and to be first paid in full, in the following order:
>
> "1st. The fees, costs and expenses of suits in the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.
>
> "2nd. All debts due to the United States, and all taxes and assessments under the laws thereof.
>
> "3rd. *All debts due to the state in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such state.*
>
> "4th. Wages due to any operative, clerk or house servant to an amount not exceeding $50, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.
>
> "5th. All debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference in like manner, as if this act had not been passed; always provided that nothing contained in this act shall interfere with the assessment and collection of taxes, by the authority of the United States OR ANY STATE."

It will be noted upon a close reading of Sec. 64 A that the trustee is not ordered to pay the taxes *due any state, any* county, *any* district or *any* municipality, but the taxes due and owing by the bankrupt to the United States, *to the state,* to *the* county, etc. If the question were asked, *which* state, *which* county or *which* district is meant, the first and most apparent answer would be, *the state in which the*

bankruptcy proceedings are pending. It is there that the bankrupt usually has the bulk of his property, and it is there that enforcement of the tax claim could be most easily made by lien, seizure and sale of the property of the bankrupt. By reference to the Statute of 1867, it is seen that in that act only those taxes were ordered paid in advance of dividends which were owing to the state in which the proceedings in bankruptcy were pending. And in the 5th Section of the Act of 1867 it was provided that nothing contained therein should interfere with the assessment and collection of taxes by the authority of the United States *or any state.*

The construction of the last clause in the Act of 1867 was before the court in *In re Ambler,* Federal Cases, 271. There a claim was made by the State of Texas for taxes due from a bankrupt, who had been adjudicated in New York, *there being no assets or property of the bankrupt in the State of Texas.* It was argued that, under the 5th Section hereinbefore referred to, no interference should be permitted with the assessment and collection of the taxes *due any state,* but Judge Blatchford, of the Southern District of New York, refused to entertain the claim for priority of payment, saying:

> "To go beyond giving a preference due the state in which the proceedings are pending might open the door to other numerous claims for preference."

No other case can be found under the Act of 1867 construing this section in any different way, and it must be presumed that Congress, in enacting the Act of 1898, had in mind the previous decisions

and did not intend to limit the collection of taxes to that state only in which the bankruptcy proceedings were pending, but preferred to give a somewhat wider limit to the right of the various states to tax priority.

It is clear, however, that it was not the intention of Congress to confer that right *upon all states*, regardless of whether there was within their borders sufficient property from which such tax could be collected, and that Congress intended to grant the right of priority to such states only who, independently of bankruptcy proceedings, *could have actually collected the tax in question from property situated within the boundaries of such state.*

Again, referring to the language of Section 64 A, we call the court's attention to the fact that it is the tax *of the state* and not the taxes *of any state or of all states* that are ordered paid as priorities. In order to ascertain the meaning and intent of Congress, it is proper to consider the history of the Bankruptcy legislation of 1898, and the amendments made to the various bills presented to Congress, and to determine therefrom what limitations Congress intended to make upon the subject matter in question.

In Lewis' Edition of Sutherland's Statutory Construction, Par. 470, Vol. 2, it is said:

> "The proceedings of the legislature in reference to the passage of an act may be taken into consideration in construing the act. Thus, the reports of committees made to the legislature have been held to be proper sources of information in ascertaining the intent or meaning of the act. Amendments made, or proposed and

> defeated, may also throw light on the construction of the act, as finally passed, and may properly be taken into consideration."

Again, in *Blake* v. *Nat. Bank,* 23 Wall., 307, the journals of Congress were referred to and the court said that they were compelled to ascertain the legislative intent in that way.

The original Bankruptcy Act of 1898 reported to the Senate was known as the Torrey Bill, No. 1,035, referred to in Vol. 30 of Congressional Records, p. 609. It contained the following provision as Sec. 65 A:

> "Sec. 65 A. Debts owing to the United States, a state, county, parish, being a political corporation, district or municipality, after being proved and allowed, shall have priority only in the event and to the extent *that they constitute a lien upon the property of the estate.*"

The Senate adopted, instead of the Torrey Bill, a substitute bill, known as the Nelson Bill (Congressional Record, Vol. 30, page 799). The Nelson Bill contained the following provision:

> "Sec. 9. That the following debts shall have preference in the order named over other debts in the distribution of the estate of the bankrupt, to-wit:
>
> "First. Debts due to the servants and laborers employed by the bankrupt for labor performed or services rendered within six months prior to the filing of such petition.
>
> "Second. Taxes or revenues due to the United States.
>
> "Third. *Taxes due any state or territory or the District of Columbia.*
>
> "Fourth. *Taxes due any county, parish, town, city or village, in the order named.*"

After the adjournment of that session of Congress, the Henderson Bill was reported to the House and that bill as reported contained many of the provisions of the Torrey Bill as finally amended in the Nelson Bill and agreed to by the Senate. The Henderson Bill, after amendment, was finally adopted and passed by the House and was concurred in by the Senate. The Henderson Substitute Bill (Vol. 31, Congressional Rec., p. 1778) contained the present Section 64 A, and that was finally passed by Congress as part of the completed act.

Now, the original Torrey Bill provided that taxes owing to the state, etc., should only have priority in the event and to the extent *that they constituted a lien* upon the property of the estate. Under the usual safeguards to collect taxes, this would have secured to each state and district the collection of taxes upon property contained within its boundaries.

But the Nelson Bill, adopted by the Senate in lieu of the Torrey Bill, dealt much more liberally with the various states and municipalities and provided that taxes due *any state* or territory or the District of Columbia should have preference over other debts. This was a broad, liberal and unambiguous provision and had the final measure contained it, there would have been reason for the allowance as priorities of any tax claim, regardless of whether there was property within the jurisdiction of the state out of which the claim could have been collected.

But Congress expressly declined to pass such a broad and liberal section in the final Henderson

Bill, and narrowed the language of the section from "the state in which the PROCEEDINGS WERE PENDING" and from "ANY state," to "THE state," county, etc. It is submitted that the only reasonable construction which meets the gradual narrowing of the language of Sec. 64 A is such as gives priority *to such state only within whose borders the bankrupt had property, from which the state might have collected the tax.* Had Congress intended to favor only the state in which the proceedings were pending it would have used the language of the Act of 1867. Had it intended to grant the boon of priority to ALL states, regardless of other conditions, it would have used the explicit language of the Nelson Bill, which provided for priority to ANY state. By refusing to use such language, only one conclusion can be arrived at, that Congress intended to give a preference to the state, *which without bankruptcy proceedings could have collected the tax in question from property within its jurisdiction.* This construction accords with the history of the legislation and grants equality to the various states or taxing bodies who might claim under Section 64.

It would have been easy to have given priority to the taxes of any state by inserting the word *"any"* before the word "state" in the act. It is significant that Congress refused to do this, thus declining to give the broad right of preference to the tax claims of *all* or *any* states.

It is easy to suppose a case where a bankrupt, a large manufacturing corporation, has its property distributed in many states. The proceedings are pending, let us say, in the State of New York. Va-

rious claims for taxes are filed as preferences, some of the claims being made by states in which the bankrupt had no property, others being made by states in which large amounts of property were situated. *If no bankruptcy proceedings had intervened, the state in which no property was situated could not have enforced its claim in any other manner than as an ordinary creditor.* If the bankrupt were an individual, and the tax in question had been an occupation tax or a license fee, the taxing body would have had no different method of enforcing the tax than any other creditor. If property of the bankrupt were within the state or taxing body, the usual remedies, if such were given, by way of lien and sale, would have availed to collect the tax from the property within the borders of the state or taxing body. But upon bankruptcy intervening there would be no sound reason for changing the status of any state with regard to its ability to collect its own tax claims. Why, for instance, should the state wherein there was no property from which the tax could have been collected *if no bankruptcy had intervened, be given a more favorable position to collect its claim in full, upon bankruptcy?*

It is easy to imagine another case, where all of the bankrupt's property, located, let us say, in Illinois, where the proceedings are pending, sold for a smaller sum than required to satisfy the tax claims of several states, some of which would not have been collectible from property within their borders, because all of the property of the bankrupt was located in Illinois. The result of counsel's construction of Sec. 64 A would be to deprive the State of Illinois, within which the property was situated, of

the right to collect it in full, because other states that had claims which could not have been collected from property in their jurisdiction without bankruptcy proceedings, had come in to claim a share of the funds which should have been paid to the State of Illinois, a state that could have enforced the payment. Our construction is neither strained nor forced, and accords with the meaning given by the history of the legislation, and it furnishes a safe and reasonable rule for the allowance of taxes as priorities. The reason for granting preference to the claims of the state, county, district, etc., in the event of bankruptcy, seems to be that they should not be deprived through bankruptcy proceedings of the preference which they could have enforced if bankruptcy had not arisen. But where no such preference could have been enforced because no property was present in the state from which the tax could have been made, all reason for granting such priority is gone.

The effect of the construction contended for by appellant would be to grant, on account of bankruptcy proceedings, a special privilege, *which perhaps never existed without such proceedings,* and such a construction surely will not be permitted.

Applying the construction in question to the facts in this case, we find from the stipulation of facts (Rec., pp. 8 and 9) that the bankrupt had no property within the State of New Jersey at the time these various license fees were assessed. Nothing in the New Jersey statutes creates *any lien* by reason of such license fee, but Section 6 of the Act of 1884 expressly says, that such tax when determined

shall be a debt due from such company to the state, for which an action at law may be maintained after the same shall have been in arrears for a period of one month. The only method given to the state by the statutes to enforce payment of the license fee is by ordinary suit and judgment.

It appears from the proof of claim filed that the state had availed itself by the remedy of injunction and that the corporation was prevented from using its franchise. But the state could not subject the property of the corporation to any lien without a judgment at law upon its claim, and the lien created within four months of the filing of a petition in bankruptcy would have been void as a preference, the same as the judgment lien of any other creditor. All of the property and assets of the corporation were located in Illinois. The State of New Jersey could have done nothing to diminish the assets excepting to file an action at law. If the state had done that, all other creditors would have had an equal opportunity to have participated in a division of the assets. The state now attempts to absorb almost the entire fund in the hands of the trustee, leaving creditors of more than $200,000 absolutely unpaid. This is attempted by reading into the construction of Sec. 64 a requirement that the trustee pay the taxes due to ANY STATE, when it is plain that Congress intended only to pay the taxes due to THE STATE which could have collected the same from property within its borders at the time of the bankruptcy. We submit that such a result would be highly inequitable and unjust, and if such a construction is contended for by appellant, it is not warranted by anything in Sec. 64 A, but on the con-

trary the construction which we have pointed out is consistent and harmonious with the history and purpose of the bankruptcy legislation.

III.

On Certiorari.

The claim for 1903 should be disallowed, because such claim was not in existence and did not constitute a debt or tax at the time the bankruptcy petition was filed.

Appellee complained of the action of the Circuit Court of Appeals for the Seventh Circuit in ordering the 1903 license fee to be allowed and paid as a general claim. It was submitted that no such allowance could properly be made on either theory, treating the license fee as in the nature of a contract obligation or treating it as a tax.

By the statutes of New Jersey in question, the corporation was required to make its return to the State Board of Assessors on or before the first Tuesday of May. In this return the amount of the capital stock issued and outstanding on the first day of January preceding was stated. The statutes further provide that the license fee became due and payable on June 1st of each year.

It is there provided that the tax, *when determined*, shall become a debt due from the corporation to the state.

The record shows that the 1903 license fee was not determined *until June 1st, 1903* (Rec., p. 15), when the certificate of the assessors was filed with the comptroller. *Therefore the debt arose and came into being on the first day of June. Prior to that*

day nothing existed upon which the state could make a claim. Had the corporation been dissolved at any time between January 1st and June 1st, there would have been no charge in existence in favor of the state for such license fee. It is plain that, although the duties of the assessors may have been merely ministerial, they had to perform certain definite acts *before any obligation* arose from the corporation to the state.

The petition in bankruptcy was filed April 23, 1903. The date of filing the petition is the date of cleavage between those debts or obligations which can be proven and paid out of the corporate assets and those which become payable *out of subsequently acquired assets and which are not dischargeable.* Thus the obligation of the ordinary bankrupt created or coming into existence after the day of the filing of the petition is not a dischargable debt and cannot be proven or allowed in the bankruptcy proceedings. And it has been held, *In re Jefferson,* 2 A. B. R., 206, that subsequently accruing installments of rent falling due after the filing of the petition in bankruptcy cannot be proved, because they are not discharged. To the same effect did the court hold in *In re Mahler,* 5 A. B. R., 453; *Atkins* v. *Wilcox,* 5 A. B. R., 313, and *In re Ells,* 3 A. B. R., 167.

Section 63 A of the Bankruptcy Act provides that a debt to be proved must be *a fixed liability absolutely owing at the time of the filing of the petition* against the bankrupt. In the forms provided by this court for proofs of claim in bankruptcy, Nos. 31 to 36 inclusive, the language is:

> "That the person by or against whom a petition for adjudication of bankruptcy has been

filed *was at and before the filing of said petition* and still is justly and truly indebted, etc."

Section 64 A provides that the court further order the trustee to pay all taxes *legally due and owing* by the bankrupt, etc.

The state of New Jersey came into the bankruptcy proceedings as an ordinary unsecured creditor, and filed a proof of claim (Rec., p. 12), in which it set up that the bankrupt was justly and truly *indebted* to it for franchise taxes, etc. Subsequently it made a motion in the bankruptcy proceedings (Rec., p. 21), *referring especially to its proof of claim filed*, for an order allowing it priority. Again in its petition for appeal (Rec., p. 26) it recites that it is *a creditor* of the bankrupt. By everything done by appellant it was assumed that it was calling for the payment of a *debt* and demanding that the debt be given a preference.

Basing the argument on the language of Section 63, which appellant refers to in its brief on this point, we find that there *is an express limitation*, as appellant admits, *that the debt shall be owing at the time of the filing of the petition.* Referring to the forms of proofs of claim suggested by this court, we again find that it must be actually in existence on the day the bankruptcy petition is filed. It cannot be said that any debt is in existence until by the language of the statute it arises and is created, and that cannot be, and in the case at bar was not, before June 1.

The exact question here presented was decided in *In re Aultman, Miller & Co.*, 12 A. B. R., 12, where it was sought to prove a license fee due to the state

of Ohio for the year 1903. The petition was filed on *April 6, 1903*, and the fee did not become a debt *until May*. The referee denied the claim and the district court affirmed his ruling. The court said:

> "The tax is one imposed upon a corporation, not on account of its property, but on account of its right to exist and to do business as a person under the provision of the laws of the state of Ohio. Whether the corporation exists or not after the petition in bankruptcy is filed, is not a question for discussion here. If the corporation is in existence then, under the act in question, it is subject to the franchise tax, and, like an individual who has gone into bankruptcy, would be subject to after incurred indebtedness and cannot have the same imposed upon its trustee in bankruptcy. If this claim of the state of Ohio be allowed for the franchise tax of May, 1903, which could not have become a charge for more than a month after the filing of the petition, then with equal force a charge could be made for the franchise tax which would have accrued in May, 1904, and so on for every succeeding year until by some legal process the corporation has been dissolved. This *reductio ad absurdum* demonstrates pretty well the impracticability of allowing a claim like this in bankruptcy proceedings. The trustee in bankruptcy may pay taxes to the state on property in his custody, but when he disposes of the property he may close the estate without being subject to any other charges on account of the property, but how is he to rid himself of this franchise tax or right of the corporation to do business as a person under the laws of the state of Ohio? This franchise does not become an asset in the hands of the trustee, and he should not be taxed on account of it. The franchise tax law does not fix any time when the same becomes a charge upon the corporation, other than that upon the filing of the report in writing to

> the secretary of state. During the month of May the secretary of state shall charge and collect from such corporation a fee of 1/10 of one per cent upon the subscribed and outstanding capital stock of the corporation, etc.
>
> "According to that a corporation cannot be delinquent nor can the charge be made against it until the end of the 31st day of May. Under the law it is evident that there was no franchise tax owing by the bankrupt to the state of Ohio at the time of the filing of the petition in this case. Such being the case, no order can be made on the trustee to pay such tax."

The same court held this to be the rule in the case of *Emmerman* v. *Ohio Steel and Iron Co.*, 13 A. B. R., 40.

The case at bar, however, is even stronger than the Ohio case, because there was not in Ohio a precise date fixed for the creation of the debt, *while in New Jersey the absolute date of June 1st is fixed by the Statutes.*

But if we regard only the language of Section 64 A, without considering 63 or the forms of proof of debt required to be used, we cannot escape the conclusion that a tax to be paid through the bankruptcy court must actually be due and owing when the petition is filed. The section in question especially limits the payment in full to such taxes which are legally due and owing. Those words must mean something. Adopting appellants' contention, however, they mean nothing. Under the theory that counsel urge, no estate in bankruptcy could ever be closed as long as any money remained which had not been applied to the payment of taxes, because since the taxes as they accrue year by year are a valid

and preferred charge against the assets in the hands of the trustee, and are not dischargeable, as counsel contends, there never would be a time when the trustee could free himself or free the estate from this burden. This state of affairs was clearly pointed out by Judge McPherson in *In re Danville Rolling Mills Co.*, 10 A. B. R., 327. In that case, as heretofore stated, appellant was attempting to procure payment in full of the license fee, and to avoid the effect of the *U. S. Car Co.* case set up an ingenuous theory to the effect that the claim for license fee was a provable debt under Section 63, Clause 4, which includes debts founded upon a contract express or implied. The state argued that when the corporation was created a continuing contract was immediately implied to pay whatever sum the state might legally require of it thereafter; that the implied contract made the corporation always contingently liable for all future taxes and charges; that the ascertainment of the license fee for 1901 was a mere liquidation of a liability that had existed from the birth of the corporation, and that therefore the obligation to pay existed when the petition was filed, although the precise sum to be paid had not yet been ascertained. That is the same theory that appellant adopts here to avoid the clear provisions of the bankruptcy law, but Judge McPherson refused to entertain seriously this contention, and said:

> "This argument is ingenuous, but I do not regard it as sound. In my opinion, Clause 4 of Section 63 does not refer to any such implied contract as, for the purposes of this case, may be conceded to exist between the corporation

and the state. As I read the statute, the subject of 'Taxes,' whatever may be the scope of the word, is dealt with by the Bankrupt Act in Clause (a) of Section 64, and is not referred to at all in Clause 4 of the preceding section. Certainly, the ordinary meaning of the phrase, 'a contract, express or implied,' does not include the public duties that a corporate creature owes to its sovereign creator. If it includes the duty to pay lawful annual charges, it also includes the duty to obey all other laws; and since 'debt' in the Bankruptcy Act means 'any debt, demand or claim provable in bankruptcy,' it would follow logically that any money claim of the state against a corporation, arising out of a violation of law, would be also provable. It seems to me impossible to stretch the language of this clause so far as to include the subject now under consideration."

Counsel have used this same case to illustrate a previous point, that the license fee could not be founded upon a contract, on page 35 of their brief. The inconsistent position of appellant is nowhere better illustrated than by the fact that it uses the language of Judge McPherson in this behalf to prove that the license fee is not a contractual obligation, *while appellant was arguing before that court that it was a contractual obligation.* The fallacy of appellant's argument was clearly exposed by the learned judge.

There is no difference in claiming a franchise tax for 1903 in the case at bar and in claiming a franchise tax for 1904 or 1905.

To affirm the judgment of the Circuit Court of Appeals allowing the 1903 license fee in any amount would be in effect to hold that there is *no time limit* during which the taxing body can claim priority

against a bankrupt estate, but that as long as there are any funds on hand, each subsequent year's charge may be claimed as a preference. This again destroys the meaning of the explicit language of Section 64 A, and introduces by implication into that section the words, "at any time up to the closing of the estate or while funds are in the hands of the trustee," making the section read, "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt at any time up to the closing of the estate or while funds are in the hands of the trustee." As estates are very often administered for a period of two or three years or even longer, it would result that each subsequent assessment would be given priority and that such claims could be preferred simply by reason of the bankrupt estate being kept open. Such a result was certainly never intended by congress.

And if counsel for appellant believed in this position, why was no claim for 1904 and 1905 license fees filed in the bankrupt estate?

Appellant argues that Section 63 has no reference to taxes and that all tax claims must be solved by virtue of Section 64;—and that as Section 64 contains no limitation as to time, it is immaterial when the tax claim accrues.

Appellant also lays stress upon the fact that tax claims are not dischargeable. That, however, does not furnish any comfort to counsel. *If a tax claim is not dischargeable, it becomes a claim against subsequently acquired property of the bankrupt.* That is the precise theory of the cases cited by us, including *Re Jefferson*, 2 A. B. R., 206; *Re Mahler*,

5 A. B. R., 453; *Atkins* v. *Wilcox*, 5 A. B. R., 13; and *In re Ells*, 3 A. B. R., 565. That a debt is not dischargeable does not mean that it shall be payable out of the assets in the hands of the trustee, like any dischargeable obligation. If it is non-dischargeable, because it accrues subsequent to the filing of the petition, as is claimed by appellant for the license fee of 1903, then there is every reason for not paying it out of the assets in the hands of the trustee, because such a claimant can look to subsequently acquired assets, whereas the general creditors of the bankrupt estate cannot. We submit that the reasoning of the *Aultman Miller & Co.* case, and the *Emmerman* case, *supra*, is persuasive and should be conclusive of this question.

We are unable to see how the use of *Re U. S. Car Co.*, 60 N. J. Eq., 514, can shed any light upon the question at issue. That case was determined under the peculiar language of the New Jersey statute, relating to a New Jersey insolvency case. We have pointed out that the case held that the license fee *was not a tax* and that it should be paid by receivers, in preference to the claims of general creditors, because of the provision of the New Jersey statute making it a preferred debt in the event of insolvency. How this case leads to the conclusion of counsel that taxes are expressly made a preferred claim against the trustee, even though they are not assessed until after the petition in bankruptcy is filed, is beyond our ability to comprehend, but the conclusion of the argument certainly discloses an absurdity. Because a discharge in bankruptcy would not bar the claim of the state against a corporation, since the corporation is liable

until its charter is surrendered to the state, counsel would argue that the license fee of 1903 should be allowed as a claim against the trustee. It is argued that the corporation continues to live after bankruptcy, and that the claim for alleged taxes is not discharged. That being true the corporation can continue to amass property and the claim of the state for alleged taxes will be good as against such subsequently acquired property, while all previously held property will be applicable to the claims of previous creditors.

In the case of an individual the date of filing the petition marks a new period of his financial career. On that day he turns over all his property and rights of property to his then existing creditors. All claims which arise *thereafter* are paid out of such property which he may acquire *thereafter* and the date of cleavage is the day of the filing of the petition. There is no difference between the case of the corporation and that of an individual. The language of Section 64 A plainly shows that congress intended to afford preference only to such tax claims *as were legally due and owing when the petition was filed.* To so hold would be in harmony with the whole purpose and intent of the Bankruptcy Act. To treat a tax claim which arose long after the filing of the petition as entitled to priority would be to introduce confusion into the clearly intended method of administration. And if the claim presented is not a tax, but arises out of contract, then if it is not in existence when the petition is filed, it certainly cannot be allowed at all. This is not similar to the case of a note or debt *absolutely existing, but not payable,* when the petition is filed. The Bank-

ruptcy Act specifically looks after such cases (Section 63). It would overturn the effect of the past decisions in bankruptcy to hold that a claim could be given life as a valid claim against an estate, because it came into being at a time when the estate was still open.

We submit that the Circuit Court of Appeals erred in allowing any claim for 1903, and that that much of its decree should be reversed and the remainder affirmed.

Conclusion.

If the claim of the State of New Jersey for 1902 had been a valid claim and were clearly a tax, collectible from property in the state, there might have been some justification for appellant's contentions, but it has been shown that it never was a valid claim, because the action of the assessors was a nullity, and that even if it were a valid claim, it was not a tax, but had been held by the highest court of New Jersey to be not a tax in the latest and most deliberate opinion upon the question. The claim for 1903 has been shown to have had no existence on the day that the bankruptcy petition was filed, and to be not entitled to allowance for any amount, either on the theory of a contract obligation or on the theory of a tax. But more than all this it has been demonstrated, we believe, to the satisfaction of the court, that the proper construction of Section 64 does not give any preference to the claim of a state for taxes, unless, within the borders of such state, there was property of the bankrupt at the time the petition was filed, to pay the taxes. If the claim of appellant should be allowed as a

priority, violence would be done not alone to the explicit language of the Bankruptcy Act and to the clear intent of Congress, but to the solemn decisions of the courts of New Jersey. But the general creditors of the bankrupt would be left in a sad plight where the bulk of the estate is paid out upon a license fee that never could have been collected by the state in any other manner than the general creditors could have collected their claims—that is, by suit and judgment. Had the State of New Jersey obtained a judgment lien against the property of the bankrupt in Illinois, where it was all located, it may well be assumed that within four months of the time that such lien accrued the general creditors would have shared in such lien by means of bankruptcy proceedings. In such a case the state would have exhausted the only remedy given to it for the actual collection of the license fee and would have been able to do no more than to share *pari passu* with the general creditors of the bankrupt. That is all that the state is entitled to do now, and we submit that from every consideration of equity and right and to carry out the spirit and intent of the Bankruptcy Act, the judgment below should be affirmed excepting in the respect we have indicated, and in that particular it should be reversed.

Respectfully submitted.

HORACE KENT TENNEY,
FREDERICK D. SILBER,
Counsel for Appellee.

Supreme Court of the United States.

No. 49.—October Term, 1906.

The State of New Jersey, Appellant, *vs.* William F. Anderson, Trustee of Cosmopolitan Power Company.	Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

[December 10, 1906.]

This is an appeal from the judgment of the Circuit Court of Appeals for the Seventh Circuit, affirming the order of the District Court, which affirmed the finding of the referee in bankruptcy, denying to the State of New Jersey a preference for alleged franchise taxes from the estate of a bankrupt, the Cosmopolitan Power Company.

On December 21, 1903, the claim for the State was filed, under the provisions of section 64*a* of the bankrupt law. The claim is set forth as follows:

Tax—1902	$5,750 00
Interest to October 15, 1903	891 25
Costs on injunction proceedings, because of nonpayment of taxes	26 15
Tax—1903	2,500 00
Interest to October 15, 1903	87 50
	$9,254 90

The Cosmopolitan Power Company is a corporation organized under the laws of the State of New Jersey on April 30, 1900, for the purpose of dealing in engines, machines, etc. By its charter it had power to do business in any State or Territory of the United States. While it had its principal office in the State of New Jersey, located under the terms of its certificate of incorporation, it had no property in that State, and conducted its business in the State of Illinois.

The capital stock of the corporation on January 1, 1902, was forty millions of dollars, of which ~~there was~~ ten millions outstanding. On May 13, 1902, its capital stock, pursuant to the laws of New Jersey, was reduced to $2,500,000. The company was adjudicated a bankrupt on April 23, 1903, upon an involuntary petition filed in the District Court for the Northern District of Illinois.

On November 7, 1902, the State board of assessors of New Jersey, the company having failed to make return, levied an assessment for the license

or franchise tax in question for the year 1902 in the sum of $5,750.00. On June 1, 1903, there was assessed against the company for the year beginning January 1, 1903, a similar tax on outstanding capital stock in the sum of $2,500.00, in accordance with the return of the company filed on May 1, 1903.

On February 12, 1904, the State of New Jersey filed its motion before the referee for the payment of said taxes as a preferential debt. The referee disallowed the 1903 tax altogether, and allowed the 1902 tax as a general claim against the estate for the sum of $4,945.08. This reduction was made from the assessment for the year 1902, because the State board had made the assessment upon the basis of $40,000,000 of outstanding capital stock, whereas, in fact, only $10,000,000 was then issued and outstanding, upon which basis the referee made the allowance. The District Court affirmed the order of the referee. Upon appeal to the Circuit Court of Appeals that court modified the judgment of the District Court so as to allow the taxes claimed for the year 1903, as a general debt, and in other respects affirmed the District Court. (137 Fed. Rep. 858.) The case was then brought here.

Mr. Justice DAY delivered the opinion of the Court.

The provisions of the bankrupt law governing the payment of taxes are found in section 64*a*, Act of 1898, (30 Stat. 563, U. S. Comp. Stat. 1901, p. 3447,) which reads:

"SEC. 64*a*. The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality, in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court."

The statute of the State of New Jersey, (Gen. Stat. 1895, §§ 251, 252, 257, 258, 260,) by its title undertakes to provide for the imposition of State taxes upon certain corporations and for the collection thereof. It requires the corporation to make return to the State board of assessors on or before the first Tuesday in May of each year and to pay an annual license fee or franchise tax of a certain per cent on its capital stock issued and outstanding on January 1 of each year, up to and including $3,000,000; a different per cent on sums in excess of $3,000,000, and not exceeding $5,000,000, and on outstanding capital stock exceeding $5,000,000, $50 per million or any part thereof. In case the corporation shall fail to make return the State board shall ascertain and fix the amount of the annual license fee, or franchise tax, and shall report to the comptroller on or before the first Monday in June the basis and amount of the tax as returned by each company

to, or ascertained by the board, which shall then become due and payable, and it shall be the duty of the State treasurer to receive the same. If the tax remains unpaid on July first after the same becomes due it shall thenceforth bear interest at the rate of one per cent per month. That the tax shall be a debt due from the company to the State, for which it may maintain an action at law for recovery thereof, after the same shall have been in arrears for the period of one month, and the tax shall be a preferred debt in cases of insolvency, and in cases of arrears for three months the State may apply for an injunction to restrain the company from exercising its corporate franchise; and that if any corporation shall be delinquent for two years its charter shall be void, unless further time be given for the payment of taxes.

It is contended for the appellee that these provisions do not entitle the State to the payment of its claim as a preferred tax within the meaning of the bankrupt act. It is insisted, in the first place, that a proper construction of the act of 1898 does not require the payment of taxes to a State wherein the bankrupt has no property, and the State no means of collecting the tax from property within its jurisdiction. And it is urged that the taxes to be paid are those legally due and owing to the United States, State, county, district or municipality, which does not contemplate payment to any and all States, but only to THE State, which, it is insisted, should be interpreted with the limitation stated.

It is to be noted that there is a very significant difference in this respect, in the act of 1898, from the provisions of the bankrupt act of 1867, (14 Stat. 530,) the law in force last before, and doubtless in the view of Congress when the present law was drafted. That act, of 1867, gave priority of payment to all debts due to the United States, and all taxes and assessments under the laws thereof, all debts due to the State in which the proceedings in bankruptcy were pending, and all taxes and assessments made under the laws of *such* State, and provided that nothing contained in the act should interfere with the assessment and collection of taxes by the authority of the United States or any State.

The requirement of the present law is a wide departure from the act of 1867, and specifically obliges the trustee to pay all taxes legally due and owing, without distinction between the United States and the State, county, district or municipality.

An argument is made as to the alleged injustice of this requirement, in that it may take away from the local creditors in the State where the property of the corporation is situated practically all the assets of the corporation in favor of the State where the corporation is organized, but has no business or property. And it is urged that to permit a State under such circumstances to have a preference in the payment of taxes would give to

it an advantage which it could not otherwise obtain for want of charge or lien upon the property. But considerations of this character, however properly addressed to the legislative branch of the government, can have no place in influencing judicial determination. It is the province of the court to enforce, not to make the laws, and if the law works inequality the redress, if any, must be had from Congress.

The question is, is the claim a tax legally due and owing to the State of New Jersey? We have been cited to many cases in the State of New Jersey, some of which it is alleged maintain the theory of the appellant that this is a tax, and some the contrary view.

Without undertaking to analyze these numerous cases or to harmonize the views expressed by different judges, we think the weight of judicial decision in that State favors the view that this is a tax imposed upon the right of the corporation to continue to be a corporation, with power to exercise its corporate franchises, based upon the amount of its capital stock issued and outstanding.

In *Hancock, Comptroller,* v. *Singer Manufacturing Co.,* (62 N. J. L. 289,) it was said:

"The act of 1884 (Pamph. L, p. 232) is entitled 'An act to provide for the imposition of State taxes upon certain corporations and for the collection thereof.'

"In this act this imposition is called a yearly license fee or tax.

"In a supplement passed to the act of 1884 (Pamph. L, 1891, p. 150) it is styled 'a tax.'

"In a further supplement, passed in 1892 (Pamph. L, p. 136), it is called 'an annual license fee or franchise tax.'

"It is wholly immaterial what name may be given to it. The fact that it is called a 'license fee' or 'franchise tax' cannot validate it. It is levied under an act passed 'to authorize the imposition of State taxes,' and it is none the less an interdicted imposition, [having reference to the charter then being considered,] and none the less a tax because it is given a new name.

"Although under our adjudications it is not a tax on property in a sense which brings it within article 4, section 7, paragraph 12, of our State constitution, it is a tax on the capital stock of the corporation. Otherwise the act would be manifestly void for want of a title expressing its object, and the State would be deprived of all its revenue under the act of 1892. The franchise of the company is the right to hold property and exercise its corporate privileges. The Supreme Court of the United States has decided that where a corporation is exempted from taxation, it is not subject to a tax on its franchise. (*Wilmington Railroad Co.* v. *Reid,* 13 Wall. 264.)"

While we take this view of the decisions of the Supreme Court of New Jersey and reach the conclusion that the claim in question is for a tax within the meaning of the law as construed by that court, the bankruptcy

act is a Federal statute, the ultimate interpretation of which is in the Federal courts. It is doubtless true, as was said in the opinion of the learned judge speaking for the Circuit Court of Appeals, in this case, that if the highest court of the State should decide that a given statute imposed no tax within the meaning of the law as interpreted by it, a Federal court, in passing upon the bankruptcy act, would not compel the State to accept a preference from the bankrupt's estate upon a different view of the law. Conceding the doctrine that the meaning of a statute is a State question, except where rights, the subject of adjudication by the Federal courts, have accrued before its construction by the State court, or the question of contract within the protection of the Federal Constitution is involved, still a State court, while entitled to great consideration, can not conclusively decide that to be a tax within the meaning of a Federal law, providing for the payment of taxes, which is not so in fact. The section (64*a*) itself declares that in case of disputes as to the amount or legality of any such tax, they shall be heard and determined by the court. The State court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of a Federal statute, giving a preference to taxes, is a Federal question, of ultimate decision in this court.

We are of opinion that this claim was for a tax. The language of the act, as we have said, is very broad and includes all taxes. It is not necessary to enter upon a discussion of the different forms which taxes may take. Generally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the government. We think this exaction is of that character. It is required to be paid by the corporation after organization *in invitum*. The amount is fixed by the statute, to be paid on the outstanding capital stock of the corporation each year, and capable of being enforced by action against the will of the taxpayer. As was said by Mr. Justice Field, speaking for the court in 102 U. S. 472:

"Taxes are not debts. It was so held by this court in the case of *Oregon* v. *Lane County*, reported in 7 Wallace. Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the Government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some States—and we believe in Tennessee—an action of debt may be instituted for their recovery. The form of procedure can not change their character."

It is urged by the appellee, and upon this ground the case was decided in the Circuit Court of Appeals, that this is in no just sense a tax levied by the State, but is the result of a contract by which the corporation was brought into existence, the consideration being the payment of annual sums for the privileges given it by the State, for which no lien is given

upon the property, but only a right of action for their recovery. But this imposition is in no just sense a contract. The amount to be paid, fixed by the statute, is subject to control and change at the will of the State. It is imposed upon all corporations, whether organized before or after the passage of the act. The corporation is not consulted in fixing the amount of the tax, and under the laws of New Jersey the charter of such corporations as this may be amended or repealed. (*Hancock* v. *The Singer Manufacturing Co.*, 62 N. J. 289–328.)

The form of the collection of taxes is left to the discretion of the taxing power; sometimes a lien is provided, sometimes a summary method of collection is awarded; in other cases, an action for debt is given, and, as in the present case, with the right of prohibition of the exercise of corporate franchises by injunction for failure to pay.

We think then that, as denominated in the statute, this was a tax imposed by the State upon the corporation for the privilege of existence and the continued right to exercise its franchise.

The State which created this corporation had the right to fix the terms of its existence, and to provide, if it saw fit so to do, that for the continued existence of its franchise the corporation should pay certain sums to the State, fixed by the amount of its yearly outstanding capital stock. (*Metropolitan St. Ry. Co.* v. *New York*, 199 U. S. 1–37 *et seq.*)

Coming to the specific objections to the claim for the year 1902, the claim was presented upon the basis of $40,000,000 of outstanding capital stock, when in fact there was only $10,000,000 of such stock, the assessment by the State board being upon the former sum and made upon the failure of the corporation to report. But we do not think the finding of the State board is conclusive. The tax is to be assessed upon capital actually outstanding. It may well be doubted whether the board had power to tax any other stock. But be that as it may, section 64*a* specifically provides that in case any question arises as to the amount or legality of taxes, the same shall be heard and determined by the court, with a view to ascertaining the amount really due. We do not think it was the intention of Congress to conclude the bankruptcy courts by the findings of boards of this character, and that the claim should have been upon the basis of the capital stock actually outstanding.

The amount claimed for the year 1903, it is insisted, had not accrued at the time of the adjudication in bankruptcy, which was on April 23, 1903, the return being made on May 2, 1903, and the assessment was not made until July 1, 1903; but the annual return required to be made to the board, on or before the first Tuesday in May, is upon the basis of the capital stock issued and outstanding the first of January preceding the making of the return. The bankrupt act requires the payment of all taxes legally due and owing. We think the tax thus assessed upon that basis

was legally due and owing, although not collectible until after the adjudication.

We reach the conclusion that, under the bankruptcy act these taxes, in the amounts hereinbefore indicated, were entitled to preferential payment in favor of the State of New Jersey, and that the Circuit Court of Appeals erred in reaching a contrary conclusion.

Its judgment will be reversed and the cause will be remanded to the District Court for further proceedings in conformity with this opinion.

Mr. Justice HARLAN (with whom concurred Mr. Chief Justice FULLER and Mr. Justice PECKHAM) dissenting.

The Chief Justice, Mr. Justice Peckham and myself dissent from the opinion of the court. In our judgment the "taxes" owing by a bankrupt to a State—which section 64*a* of the bankruptcy act provides shall be paid in advance of the payment of dividends to creditors—do not embrace an "annual license fee or franchise tax," (the words of the New Jersey statute,) which, strictly, is not a property tax, but only an exaction by the State for the privilege given to a corporation to do certain business under its charter. We think the bankruptcy act should be so construed. It cannot be otherwise construed without doing gross injustice to those creditors of the bankrupt corporation who have business transactions with it at its place of business. Here the bankrupt corporation did no business in New Jersey. So far as appears, it did not have, nor expect to have, any connection with that State except to become incorporated under its laws. It had its seat of operations and all its tangible property in the State of Illinois. It had no property in New Jersey. Its scheme was to get a charter from New Jersey and then go to another State for purposes of its business. We do not think that Congress intended that in the distribution of the assets of a bankrupt preference should be given to the claims of a State which have their origin in and are wholly based upon a *bargain* with the State whereby certain privileges are granted in exchange for certain payments—privileges which the State may grant or withhold at pleasure. In our opinion the word "taxes" in the bankruptcy act was intended to embrace only burdens or charges imposed *in invitum* and which were in their nature and in reality "taxes," as distinguished from governmental exactions for privileges granted. The claim of New Jersey, whatever its true amount, should not be given priority, but should be placed upon the same footing with claims of other creditors. This view is consistent with the act of Congress.